

No. 14086

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United States  
Court of Appeals  
for the Ninth Circuit

STEPHEN KONG, JR.,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the  
District of Hawaii.

FILED

FEB 1 1954

PAUL P. O'BRIEN  
CLERK



No. 14086

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District of Hawaii.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

For the Plaintiff, United States of America :

A. WILLIAM BARLOW, ESQ.,  
United States District Attorney,  
Federal Building,  
Honolulu, T. H.

For the Defendant, Stephen Kong, Jr. :

O. P. SOARES, ESQ.,  
1023 Union Trust Building,  
Honolulu, T. H. [1\*]

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.





In the United States District Court  
for the District of Hawaii

Cr. No. 10,704

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STEPHEN KONG, JR.,

Defendant.

INDICTMENT

(18, U.S.C., Section 1503)

The Grand Jury charges:

That on or about November 8, 1952, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Stephen Kong, Jr., did endeavor to influence, obstruct and impede the due administration of justice in that he did knowingly, wilfully, unlawfully, feloniously and corruptly endeavor to influence, intimidate and impede Samson Nani Peneku, the said Samson Nani Peneku being then and there a trial juror duly impaneled and sworn in the case of United States vs. Charles Fujimoto, et al., Cr. No. 10,495, pending in the United States District Court for the

Territory of Hawaii, in violation of Section 1503, Title 18, United States Code.

Dated: Honolulu, T. H., this 18th day of February, 1953.

A True Bill.

/s/ GEORGE D. SCOTT,  
Foreman, Grand Jury.

/s/ A. WM. BARLOW,  
United States Attorney.

Presented in Open Court February 18, 1953.

[Endorsed]: Filed February 18, 1953. [3]

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PROCEEDINGS WITH REFERENCE  
TO INDICTMENT

Conference at Bench—February 18, 1953

The Court: With respect to this case, you are inviting my attention—

Mr. Barlow: I am inviting attention to an indictment that has been returned against Steven Kong, Jr., and ask at this time that the indictment be placed on the secret file for the following reasons: The individual who had been approached in this matter was a man by the name of Peneku. At the time he was approached he was duly impaneled to serve as a juror in the Fujimoto-Smith Act trial which is now in progress before Judge Jon Wiig, and in order that the government can never be

accused of creating a climate that perhaps may be prejudicial to any of the defendants, the government at this time would like to have the matter put in the secret file until such time as the Smith Act case before Judge Wiig is terminated.

The Court: Very well. Although it does not fit squarely within the technical provisions of Rule 6 (e), I will nevertheless grant the request in view of the fact that it is the government that asks for it and assumes the responsibility of the man fleeing the jurisdiction before the indictment is released from the secret file.

Mr. Barlow: Thank you.

The Court: And as soon as that particular case, so-called Smith Act case, is over, that is over in the legal sense, in this court exclusive of any appeals.

Mr. Barlow: That is right, your Honor.

The Court: This indictment then automatically comes off the secret file.

Mr. Barlow: Thank you, sir.

February 20, 1953.

/s/ DOROTHY M. WOLFE,  
Official Court Reporter. [4]

The United States District Court  
for the District of Hawaii

[Title of Cause.]

FROM THE MINUTES OF  
FEBRUARY 18, 1953

The grand jurors appeared in a body and through their foreman, Mr. George J. Scott, in the presence of Mr. A. William Barlow, United States District Attorney, returned an Indictment charging the defendant above named with violation of Section 1503, Title 18, United States Code.

Upon request of Mr. Barlow, the Court ordered the Indictment placed on secret file. [5]

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The United States District Court  
for the District of Hawaii

[Title of Cause.]

FROM THE MINUTES OF  
JULY 15, 1953

On this day came Mr. A. William Barlow, United States District Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for hearing on motion to dismiss.

Following argument by respective counsel, the motion to dismiss was denied by the Court.

Hearing on motion for bill of particulars was set for July 20, 1953, at 1:30 p.m. [6]

The United States District Court  
for the District of Hawaii

[Title of Cause.]

FROM THE MINUTES OF  
JULY 20, 1953

On this day came Mr. A. William Barlow, United States District Attorney, and also came Mr. O. P. Soares, counsel for the defendant herein. This case was called for hearing on motion for bill of particulars.

The motion was submitted without argument and was granted by the Court as to Item No. 2, Items Nos. 1 and 3 in part only.

The Court ordered the bill of particulars furnished the defendant by July 24, 1953, at 4 p.m., and this case was ordered continued to July 29, 1953, at 2 p.m., for plea. [7]

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The United States District Court  
for the District of Hawaii

[Title of Cause.]

FROM THE MINUTES OF  
AUGUST 14, 1953

On this day came Mr. Nat Richardson, Jr., Assistant United States District Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for trial.

The parties being ready, the following jurors were drawn to fill the jury box:

Marvin Bainbridge

Stella M. Humphrey  
Edward C. Respicio  
Francis K. Akana, Jr.  
Mary S. Teves  
Gertrude Nihipali  
Dorothy G. Fantasia  
Solomon K. Lalakea  
Muriel M. Huddy  
Albert F. Soon  
Samuel L. Chastain  
Frank T. Rania

Respective counsel having waived all peremptory challenges and the jury being satisfactory, the above-named jurors were sworn at 9:37 a.m. to try the issues in this case.

Motion made by Mr. Soares to exclude all witnesses from the courtroom was denied by the Court.

Opening statement was made by Mr. Richardson.

At 10:05 a.m., Mr. Samson N. Peneku was called and sworn and testified on behalf of the plaintiff.

At 11:06 a.m., Mrs. Emma H. Peneku was called and sworn and testified on behalf of the plaintiff.

At 11:36 a.m., the plaintiff rested.

At 11:49 a.m., Mr. Stephen Kong, Jr., was called and sworn and testified on his own behalf.

At 12:02 p.m., the Court ordered this case continued to 2 p.m. this day for further trial.

At 2:05 p.m., the witness Kong resumed the witness stand and testified further.

At 2:43 p.m., the defendant rested.

At 2:45 p.m., Mrs. Minnie Kong was called and sworn and testified on behalf of the plaintiff.

At 3:23 p.m., both sides rested.

At 3:25 p.m., the Court ordered this case continued to August 17, 1953, at 10 a.m. for further trial, respective counsel to settle instructions at 8:30 a.m. on August 17, 1953. [8]

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The United States District Court  
for the District of Hawaii

[Title of Cause.]

FROM THE MINUTES OF  
AUGUST 17, 1953

On this day came Mr. Nat Richardson, Jr., Assistant United States District Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for hearing on the settlement of instructions and for further trial.

Motions for the government to elect under which charge it was proceeding and for judgment of acquittal were made and argument was had thereon by Mr. Soares, following which the motions were denied by the Court.

At 10:03 a.m., in chambers, further hearing was had on the matter of instructions.

At 10:11 a.m., in open court, it was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

Motions for the government to elect and for judgment of acquittal were renewed by Mr. Soares and were denied by the Court.

At 10:16 a.m., argument was had by Mr. Richardson.

At 10:24 a.m., argument was had by Mr. Soares, followed by Mr. Richardson in his closing argument at 11:08 a.m.

At 11:13 a.m., the Court instructed the jury.

At 11:49 a.m., the jury was excused from the courtroom and Mr. Soares excepted to the Court's instructions.

At 11:52 a.m., the jury returned to the courtroom and was further instructed by the Court.

At 12 noon, Mrs. Lily L. M. Deering, Special Bailiff, and Mr. Harry T. Tanaka, Court Crier, were sworn as bailiffs to take charge of the jury during its deliberations.

At 12:05 p.m., the jury proceeded to lunch, returning at 1:30 p.m. to deliberate upon a verdict herein.

At 5:40 p.m., pursuant to its request, the jury returned to the courtroom and was further instructed by the Court.

At 5:47 p.m., the jury retired to deliberate further.

At 6:20 p.m., the jury proceeded to dinner, returning at 7:30 p.m. to deliberate further.

At 9:25 p.m., the jury returned to the courtroom and in the presence of respective counsel and the defendant and through its foreman returned the following verdict of guilty which was ordered placed on file:

“We, the Jury, duly empaneled and sworn in the



above-entitled cause, do hereby find the defendant, Stephen Kong, Guilty as charged in the Indictment herein.

“Dated: Honolulu, T. H., this 17th day of August, 1953.

“/s/ SAMUEL L. CHASTAIN,  
“Foreman.”

Upon the verdict of guilty, the Court adjudged the defendant guilty as charged in the Indictment and ordered this case continued for presentence investigation, the defendant to report to the Probation Officer on August 18, 1953, at 9 a.m.

Bond was set in the sum of \$1,000.00 and the defendant was allowed until August 18, 1953, at 4 p.m., to file the bond. [9]

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED  
INSTRUCTIONS

Comes now the United States of America, by A. William Barlow, United States Attorney for the District of Hawaii, and respectfully requests the Court to give to the jury the following instructions.

Dated: Honolulu, T. H., this 17th day of August, 1953.

UNITED STATES OF  
AMERICA,  
Plaintiff;

A. WILLIAM BARLOW,  
United States Attorney,  
District of Hawaii;

By /s/ NAT RICHARDSON, JR.,  
Asst. United States Attorney,  
District of Hawaii. [11]

Instruction No. 1

It is not necessary for the government to show that anyone attempting to influence a juror be successful in his attempt.

If you find beyond reasonable doubt that Stephen Kong did endeavor, or try to influence Samson N. Peneku in any way concerning his duties as a trial juror in the case of United States vs. Charles Fujimoto, et al., then you must convict.

Denied as submitt., but OK as to parg. No. 1.

Given as to parg. No. 1.

/s/ J. F. Mc. [12]

DEFENDANT'S REQUESTED  
INSTRUCTIONS

Instruction No. 1

You cannot find the defendant guilty unless you are unanimously agreed that Stephen Kong corruptly endeavored to influence, obstruct, *and impede the discharge of Mr. P's duty as a trial juror in U. S. v. Fujimoto, Cr. No. . . . .*, *in this Ct. then pending,\** or impede the due administration of justice.

The mere request by defendant made to a juror to vote not guilty as a favor to the person making the request, he not being a party to, nor having a personal interest in the case on trial, will not warrant finding defendant guilty.

Denied as submitted.

Given as amended as to parg. 1 only.

/s/ J. F. Mc. [13]

Instruction No. 2

If you cannot unanimously say that you believe from the evidence that defendant's purpose in speaking to the juror Peneku was corrupt and that in doing so he was endeavoring to influence, obstruct, or impede the due administration of justice, your verdict must be not guilty.

Denied—as motive not an element.

Amend to use word purpose.

Will instruct that corrupt=Cr. intent. [14]

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\*[Matter set in italics appeared as an alteration on original.]

## Instruction No. 3

The word "Endeavor" as used in the statute and in the indictment means more than a simple request unaccompanied by any effort or inducement to have the request granted.

Denied.

U. S.-Russell, 255 U.S. 138, 143. [15]

## Instruction No. 4

The word "endeavor" is distinguished from synonomous words such as "attempt" or "effort" by the fact that the synonomous words relate to a single act whereas the word "endeavor" means a continued series of acts.

Denied.

See U. S. v. Russell. [16]

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District Court of the United States for the  
District of Hawaii Division

Cr. No. 10,704

UNITED STATES OF AMERICA

vs.

STEPHEN KONG

## JUDGMENT AND COMMITMENT

On this 4th day of September, 1953, came the attorney for the government, and the defendant appeared in person and by counsel, O. P. Soares, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of endeavoring to influence, obstruct and impede the due administration of justice in that he did knowingly, wilfully, feloniously and corruptly endeavor to influence, intimidate and impede Samson Nani Peneku, the said Samson Nani Peneku being then and there a trial juror duly impaneled and sworn in the case of United States vs. Charles Fujimoto, et al., Cr. No. 10,495, pending the United States District Court for the Territory of Hawaii, in violation of Section 1503, Title 18, United States Code, as charged, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Years.

Mittimus ordered stayed until September 14, 1953.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the

United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. FRANK McLAUGHLIN,  
United States District Judge.

/s/ WM. F. THOMPSON, JR.,  
Clerk. [17]

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Name and address of appellant: Stephen Kong, Jr., Heeia, Oahu, or c/o P. O. Box 2702, Honolulu, Hawaii.

Name and address of appellant's attorney: O. P. Soares, 1023 Union Trust Building, Honolulu, Hawaii.

Offense: Endeavoring to influence, obstruct and impede the due administration of justice in violation of Section 1503, Title 18, United States Code.

Statement of judgment and order: Pursuant to verdict theretofore rendered, the Honorable J. Frank McLaughlin, Chief Judge of the above-entitled Court, on the 4th day of September, 1953, adjudged defendant guilty and sentenced him to imprisonment for three years.

Appellant is now at liberty on duly approved bond in the sum of \$1,000.00 awaiting disposition of his motion to be released on bail pending appeal.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit.

Dated: Honolulu, Hawaii, September 11, 1953.

STEPHEN KONG, JR.,  
Appellant.

/s/ O. P. SOARES,  
Appellant's Attorney.

[Endorsed]: Filed September 11, 1953. [19]

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[Title of District Court and Cause.]

**BOND**

Know All Men by These Presents:

That we, Stephen Kong, as Principal, and Edmund C. Paik, as Surety, are held and firmly bound unto the United States of America in the full sum of One Thousand Dollars (\$1,000.00) for the payment of which well and truly to be made, we do bind ourselves, our executors and administrators, jointly and severally by these presents;

Whereas, lately, in the District Court for the United States in and for the District and Territory of Hawaii, judgment and sentence were made and entered against Stephen Kong, Defendant above named, and

Whereas, notice has been given of appeal to the United States Court of Appeals for the Ninth

Judicial Circuit, to secure a reversal of said judgment and sentence, and

Whereas, the Honorable J. Frank McLaughlin, Judge of said District Court, did regularly order that bail bond be given in the sum of One Thousand Dollars (\$1,000.00) pending said appeal,

Now, Therefore, the condition of the above obligation is such that if the said Stephen Kong shall appear here in person or by attorney in the United States Court of Appeals for the Ninth Judicial Circuit on such day or days as may be appointed for the hearing of said cause in said Circuit Court and prosecute his appeal and shall abide by and obey all orders [21] made by said Appellate Court in said cause, and shall pay any damages and all costs imposed by the judgment of said District Court against him, and shall surrender himself in execution of the judgment and sentence appealed from as said Circuit Court may direct, if the judgment and sentence against him shall be affirmed or the appeal dismissed; and if he shall appear for trial in said District Court on such day or days as may be appointed for a retrial of said cause and abide by and obey all the orders made by said District Court, provided the judgment and sentence made against him shall be reversed by said Circuit Court, then the above obligation shall be void, otherwise to remain in full force, effect and virtue.



In Witness Whereof, the above bounden Principal and Sureties have hereto affixed their hands this 12th day of September, 1953.

/s/ STEPHEN KONG,  
Principal.

/s/ EDMUND C. PAIK,  
Surety.

Taken and acknowledged before me this 12th day of September, 1953.

[Seal] /s/ THOS. S. CUMMINS,  
Deputy Clerk, United States  
District Court.

Approved as to Form:

/s/ A. WM. BARLOW,  
United States Attorney.

Approved as to the Amount and Sufficiency of  
Surety:

/s/ J. FRANK McLAUGHLIN,  
Judge, United States District  
Court.

[Endorsed]: Filed September 14, 1953. [22]

In the United States District Court  
for the District of Hawaii

Criminal No. 10,704

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STEPHEN KONG, JR.,

Defendant.

### TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the United States District Court, Honolulu, T. H., on Wednesday, July 15, 1953, on motion to dismiss the indictment.

Before: Hon. J. Frank McLaughlin, Judge.

Appearances:

O. P. SOARES, ESQ.,

Appearing for Defendant.

A. WM. BARLOW, ESQ.,

United States Attorney,

Appearing for Plaintiff.

The Clerk: Criminal No. 10,704, United States of America vs. Stephen Kong, Jr., for hearing on motion to dismiss indictment.

Mr. Soares: I am ready.

Mr. Barlow: Ready.

The Court: All right. Mr. Soares, you and your client are ready and the client present?

Mr. Soares: This is a motion to dismiss the indictment on three grounds, the first of which is that the defendant has been in jeopardy over this same offense. There is no dispute of the facts as set up in the defendant's affidavit in support of the motion. The jeopardy to which we refer, if the Court please, is his response and appearance before Judge Wiig on an Order to Show Cause, in which it was alleged that he has obstructed or impeded justice. In other words, the exact language of the indictment, the administration of justice, except, of course, that the matter before Judge Wiig was in the nature of contempt proceedings, whereas the matter, of course, here is a felony as described in the statute and as to which an indictment was returned. We take the position, however, may it please the Court, that the jeopardy is the same. In other words, it is slightly different in our view from the situation in which a defendant has been indicted in a state or territorial court of an offense and then indicted [\*1] in the federal court of the same offense where the jurisdictions are different but where the power before whom the defendant has twice been ordered to appear is derived from the same source.

The other was simply a matter of contempt proceedings, but for the same facts, and we submit that

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

that is the test, it is the identity of the act and the same. Or I think some of the cases have phrased it as, would the decision in the second proceeding negative the action in the first? In other words, the mere fact that he was hailed before the Court for contempt doesn't follow the situation that the contempt consisted of his impeding the due administration of justice. And in this case it is the same thing, impeding the due administration of justice. It is illustrated by a case, an old case, that took place in the Phillipines, in which a man was acquitted by a court martial of the crime of homicide—I think it was called—because as we know court martials have not assessed capital punishment, having been acquitted by the court martial the Phillipine authorities had him indicted, charged with what they called assassination and convicted him, incidentally. The matter was taken before the Supreme Court. The Supreme Court there held that the test was not two separate jurisdictions but the two bodies which took part in the proceeding derived their power from the same source and that therefore the indictment by the Phillipine government was not authorized and the conviction was set aside. That is as to the first [2] ground of the motion.

As to the second ground, we complain that the defendant, to proceeding this case, it would be depriving the defendant of his right guaranteed under the constitution of a speedy trial.

I am frank to say, if the Court please, after a more or less exhaustive search, that it has not re-

vealed any case in which the facts are similar to this. All the cases that I have been able to encounter have been instances where the man was first indicted and then a delay in his prosecution which resulted sometimes in the indictments being dismissed because the trial was not speedy. At other times, the motion for dismissal being denied either because the defendant himself had waived the right to a speedy trial—but this seems to me—and I may be mistaken—it seems to me a case of the first instance where the man was indicted and then was deprived of any opportunity for a trial because the indictment was placed in the secret file. He couldn't prepare for a trial. He couldn't ask for a trial.

The Court: Well, is the principle that you advert to relevant until you have an issue to try?

Mr. Soares: Yes, there was an issue to try. That is his guilt of this crime. And he was indicted.

The Court: There has been no plea.

Mr. Soares: That is true. There is an issue to try. [3] The case itself is not an issue. But the issue—let us use the legal phraseology—the issue has not been joined, but the issue has been set up.

The Court: Is the right to a speedy trial an absolute right?

Mr. Soares: Yes, yes, as I understand it, if the Court please. It says, as I remember it, that all persons shall enjoy the privilege or right of a speedy trial. Now, that is absolute. He could waive it, it is true, but it is not one that the government can take away. And it is especially vicious in this case, if the Court please, from the defendant's point of view

because of the reasons which actuated the government to ask that this indictment be placed on the secret file.

Now, I think it will be conceded that the purpose of placing indictments in the secret file is to keep the accused from being forewarned and perhaps escaping, escaping the execution of a bench warrant, or the process by which he is brought into Court.

Here the government said or asked the Court to deprive this man of his right for a speedy trial because, forsooth, the government did not wish to be accused of creating an unfavorable atmosphere or climate—I think that was the word they used—in an entirely different case. In other words, the Smith Act case was on trial. And the government was willing to deprive this defendant of his constitutional right [4] right because they didn't want to be criticized later on.

Now, I respectfully submit that it is highly improper that one's constitutional rights should be overlooked or set aside or ignored merely because somebody else might complain that the government is being unfair to them when there is no connection between their being required to answer to the Court and this defendant. It is true that the statute does say——

The Court: Is there any proposition of the government being fair to itself?

Mr. Soares: No, the government is not an entity different from a citizen whose right is guaranteed.

We cannot say this is the government and therefore it is entitled to a certain consideration. And that is a citizen and therefore he is not entitled to consideration. The government has no right as such. It is the people who have the rights.

The Court: Well, the government represents the people.

Mr. Soares: In this case they misrepresented the people.

The Court: Well, does not the public have some rights?

Mr. Soares: And this defendant is one of the public. They have no rights in opposition to the constitutional rights, if the Court please.

The Court: Well, they have the public speaking [5] through its government and have rights as against a defendant in a criminal case.

Mr. Soares: No. I submit not. Some of the courts have gone so far as to say that the government has to choose if there is a conflict between one person's constitutional right and a prosecution or a government right, the government has to choose which it thinks or cannot choose one as against another's constitution right and must forego the other, but there is nothing superior to the right guaranteed by the constitution.

The Court: You don't believe that the overall considerations of the best interests of justice repose in a Court's discretion as to whether or not an indictment should be kept in the interests of justice in the secret file and whether there should be a file if it didn't remain in the secret file?

Mr. Soares: I take the position that you cannot deprive one person of a constitutional right that is not in conflict with the rights of others but simply a matter of policy on the part of the government. Now, it is quite clear from a perusal of Mr. Barlow's remarks exactly what happened. And it is the kind of thing I don't hesitate to state that has happened too often in the Territory of Hawaii with regard to these very same people and their ilk, where they lean over backwards to avoid criticism by the ILWU or even the Communists [6] when they haven't any greater right than anybody else. And in passing I might say that it is strange that they who are so vocal in their insistence on the constitutional rights being observed to the very letter of the law when their individual rights are concerned are quite willing that the individual rights of others might be ridden rough shod and that is precisely what has happened here.

Whatever background there is to the government's request that this indictment be placed in the secret file, the fact remains that the statement was made not that in fact the government would be hampered in its prosecution of the Smith Act case, not in fact that to let it be known to the defendant that he had been indicted would have probably or even possibly resulted in a miscarriage of justice in other cases—

The Court: But supposing the situation such as this resulted not from the government's request but from the Court's own feeling about the matter in the best interest of justice?



Mr. Soares: Well, the principle would not be changed, if the Court please.

The Court: Well, you keep referring to the government here, of course.

Mr. Soares: Well, I mean the prosecution.

The Court: You think that there is an absolute right [7] to a speedy trial?

Mr. Soares: I don't see how language could be clearer or more specific, if the Court please.

The Court: Isn't it a relative right, a qualified right?

Mr. Soares: It is a right granted without qualifications.

The Court: But supposing both judges of this Court dropped dead, supposing we had a plague here and all the jurors had some disease and we couldn't have a trial?

Mr. Soares: That would determine what was or was not a speedy trial.

The Court: Well, speedy under given circumstances.

Mr. Soares: Yes, exactly, under proper circumstances. In other words, a government, a prosecutor might wait until the very last day of the statute of limitations to file his indictment and have it returned. Now, the defendant couldn't complain that he had not been indicted earlier. We have a Territorial law which I have argued unsuccessfully, which was in my belief designed to take care of that kind of a situation, but that is not what we are confronted with here now. Had the government elected to withhold presenting this matter to the Grand

Jury, then we couldn't complain, whatever the reasons may have been. But they didn't. There had been this period of time during which the defendant knew nothing about [8] the existence of this indictment. And we don't know and I submit it is immaterial what witnesses he may have had that will not be available to him now because of the delay or whatever other prejudice there may have been.

The Court: Well, that is speculative. Have you any evidence to offer that because of the alleged delay he has lost the advantage of having certain witnesses?

Mr. Soares: No, if the Court please. I am just pointing out the reason for the rule. And a very, very learned judge of the federal court, not to make a play on words, in a very important case said that it didn't make any difference. I quoted that language because it seemed to me so significant, if the Court please. I made a note of it wherein he said—and this is Mr. Learned Hand in the Coplon case——

“In truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal——”

This had to do with the examination of some records.

“——but we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor.”

The Court: Well, there is also a case that has

a little more age to it, *United States vs. Holmes*, 168 Fed. (2d) 888, Third Circuit, 1948, where on this point which is a little bit different than the one in consideration of the Coplon case, Judge O'Connell stated at page 891 as follows: [9]

“In the complete absence of any indication that the instant defendant was adversely affected in the preparation or prosecution of his defense by the lack of time in bringing this case to trial, we can see no ground for complaint by defendant on that score.”

That is why I asked you if you had any proof to offer——

Mr. Soares: I take the position of Mr. Justice Hand, that we don't need any proof except to demonstrate that he has been deprived of a right, through no fault of his own.

The Court: The last time I followed Mr. Justice Hand, I got reversed.

Mr. Soares: Well, I am not expressing any wishes now. I hoped to dispose of this case in this Court.

The Court: But I admire him greatly.

Mr. Soares: But there it is. The thing that arouses me so much, if the Court pleases, perhaps is emotional rather than legal. But it is for the purpose of assisting because that is what it amounts to, people who the government knew and the jury later found were not deserving of any but the strictest compliance with the law, this man—well, to use some uncourtly language—was made the goat by having this placed in the secret file.

I just want to emphasize one more point in that connection, and that is with reference to the language of the [10] statute. It is true that the statute does say that the Court may place the indictment in the secret file, but I think it is clear it is meant in those cases where the defendants are still to be apprehended, because the language of the rule itself—

The Court: Before you get to that point, did you run across this old case in this court that my law clerk dug up in 3 Hawaiian Reports of the U.S. District Court for Hawaii where I am advised by him the facts are somewhat like these? It is where a man was indicted in 1904 and they found him in 1909, but he had not been hiding. He had been working every day, but for some reason or other the Marshal couldn't find him. And he interposed this claim that you here assert, namely, that he had been deprived of a speedy trial. He was successful.

Mr. Soares: I am going to show the distinction, however, which makes this case stronger. There the indictment was known to the world, and I am not familiar with the case, but I am trying to say because I have never been in sympathy with the Hawaiian Reports of the U.S. District Court because they purport to be reports of a court that wasn't even a court. I mean not a District Court like the Ninth Circuit as the Supreme Court of the United States has ruled. But certain people took pride in their decisions and had certain inferences which they let the legislature make. Incidentally, [11]

those reports were not published by the federal court. The Territorial tax payers footed the bill for federal purposes. But that is neither here nor there. The fact remains that even then——

The Court: You weren't the reporter in this case?

Mr. Soares: No. I was only fourteen years old, thirteen years old.

The Court: There is a difference in the facts, yes. But I think as a relic of the past you might be interested.

Mr. Soares: Yes, I am glad to have your Honor's point—I am glad to have your Honor point that out. I am going to read that.

The Court: I will give you the exact citation which my industrious law clerk found. It is 3 U.S. District Court, Hawaii Reports, 381, year 1909, U. S. vs. Kojima, K-o-j-i-m-a.

Mr. Soares: That leaves me with one other ground of the motion, if the Court please, and that is that the indictment does not charge an offense against the United States. In a presentation I made to your Honor not long ago about a statute describing what amounts to a number of separate offenses, but where the punishment can be for only one, your Honor will recall the Charles case. But this statute describes as I have computed them six means by which it may be violated. The first one relates to influencing and intimidating and impeding witnesses. The next is impeding, influencing jurors or other officers of the court. The next is with reference to

injury [12] of parties or witnesses and/or with the jury for either finding an indictment or returning a verdict. And then injuring an officer. Now, none of those is described in this indictment. What is described in this indictment is the influencing and obstructing or impeding of the due administration of justice.

Now, we say the indictment is insufficient for two reasons: First, it does not indicate that justice was being administered or the impediment of justice sought to be administered was in any pending case which I believe to be a requisite of the offense. And the next is that unlike the other instances where the influence and intimidation is sufficient no matter how made, here it must be in the case of the obstructing of the due administration of justice, it must be by threat or force or by threatening letters or communications. And there is no indication in the indictment anywhere that the defendant's effort to obstruct justice was by the use of threats, force or threatening language, threatening letters or other communication.

The Court: Have you a familiarity with the case of Hicks vs. United States, 173 Fed. (2nd) 570, Fourth Circuit?

Mr. Soares: No, I do not.

The Court: There the argument that you advance was rejected and, in other words, the words of the statute were held sufficient.

Mr. Soares: But we complain it is not in the words [13] of the statute. The words of the statute are by force—let's see now—

The Court: Corruptly or by threats or by force.

Mr. Soares: By threats or force or by threatening letters or communications.

The Court: Anyone of those.

Mr. Soares: And as that language appears, is there any indication in this present indictment, if the Court please?

The Court: Of what?

Mr. Soares: Of threats, of force, and so on, as to the due administration of justice?

The Court: Well, it has never been required by the government to allege the evidence.

Mr. Soares: But if it had been a charge of attempting to intimidate, influence or impede, if I get the order properly, the juror in the discharge of his duty—the indictment would have been sufficient, but that isn't the charge. The charge is impeding the due administration of justice. And under the language of the statute, as I construe it, the impeding of the due administration of justice must be by threats, or force or by threatening letters or communications. There is a distinction. That is the distinction I am trying to draw.

The Court: All right. Mr. Barlow, it seems you are out in the left field.

Mr. Barlow: I will be back in center soon. [14] I will take them in the inverse order in which Mr. Soares argued the matter. Apparently Mr. Soares in reading the statute, section 1503, has either conveniently or otherwise overlooked the word "corruptly." And the indictment does allege that Kong

did endeavor to influence, obstruct and impede the due administration of justice in that he knowingly, wilfully, unlawfully, feloniously and corruptly endeavored to influence, intimidate and impede the said Peneku. And Mr. Soares says that there is no indication as to what Peneku was doing at the time, that he was a juror or anything else. And the indictment definitely states that he did corruptly endeavor to influence, intimidate and impede Peneku, the said Peneku being then and there a trial juror duly impaneled and sworn in the case of so and so pending in the U. S. District Court for the Territory of Hawaii.

All the elements of the statute are incorporated in the indictment. All the elements that Mr. Soares says are not incorporated, if he reads it carefully, are incorporated. Every single, solitary element of this charge is incorporated in this indictment. It is in the wording and language of the statute and the cases are legion which hold that you do not have to go any further than that. If you allege in the words of the statute, that is all you have to do. And your Honor has cited the Hicks case which in the opinion of the government is exactly in point.

Now, we will go on to points Nos. 1 and 2. I [15] will take them in the order of the motion by Mr. Soares.

The defendant moves that the indictment against him, now filed in the above-entitled matter, be dismissed because he has been in jeopardy of conviction of the offense charged.

Now, I don't know whether Mr. Soares has taken



the time to look through the record, but if he did, in Miscellaneous No. 481, in the matter of Stephen Kong, before the Honorable Jon Wiig, it reads as follows—

The Court: I am familiar with it.

Mr. Barlow: You have it, sir?

The Court: I have the file here.

Mr. Barlow: And the Court there told Mr. Kong that in order that the present trial continue, that he, of his own motion, was dismissing the Order to Show Case, that he was referring the matter to the United States Attorney for appropriate action.

The Court: Mr. Soares' point, however, is that he had been in jeopardy of being found in contempt, that the matter had been started.

Mr. Barlow: Well, your Honor, I think if Mr. Soares would have gone to the case he would have found two cases exactly in point where a Court has held, in *O'Malley vs. United States*—

The Court: That is 128 Fed. (2nd), reversed on another ground. [16]

Mr. Barlow: That was reversed on the point involving the statute of limitations.

The Court: My law clerk found that, too.

Mr. Barlow: But I will just read the syllabus there and I think that should suffice.

“Punishments for contempt of court and on conviction under indictment for the same acts are not within the protection of the constitutional inhibition against ‘double jeopardy’.”

“Acts of misbehavior constituting violation of the

criminal law may also constitute 'contempt of court' if committed in the presence of the court."

"The power to punish for contempt is inherent in and inseparable from the court hearing a cause."

Now, there is another case which is cited in this case, Merchants' Stock & Grain Co. vs. Board of Trade of City of Chicago, in 201 Federal Reporter. I will just cite syllabus No. 8.

The Court: On what page?

Mr. Barlow: That is page 21.

"Where an act which constitutes a contempt of court is also a crime, it may be punished both by summary action by the court and by indictment, and neither will bar the other."

Now, those cases are directly in point. Mr. Soares has quoted or cited nothing other than an argument. He hasn't referred to the law whatsoever. With relation to count No. 2— [17]

The Court: Ground No. 2.

Mr. Barlow: —or ground No. 2, probably I, as an individual, am in sympathy with some of the remarks that Mr. Soares has made to the Court today. But there comes a time when the government in dealing with its citizens must look to the overall good of those citizens, and public justice oftentimes and always should take precedence over private justice. And if your Honor would consult the record in the Fujimoto case, your Honor would discover that it wasn't the government that asked that this matter be put on the secret file. At that time I think it was—well, whatever time it was—Judge Wiig had been assigned the criminal calendar. This was a

matter that would have come before Judge Wiig on the criminal calendar. He is sitting in the Fujimoto case—he was sitting in that case and had gone into the various aspects of the alleged misbehavior of Mr. Kong, and he made a determination that in the interests of public justice that this matter should be presented to the Grand Jury at that time, because in the interests of justice again the government was interested in conserving testimony.

The Court: That it be presented or be not presented?

Mr. Barlow: No, be presented, that the Judge had asked the government to look into this matter and if it found that there was a possible violation of a statute to then present it to the Grand Jury. And that if the Grand Jury should [18] return an indictment, that that indictment be put in the secret file for reasons which to him at that time were obvious, which to the defendant's counsel were obvious and which the government felt were obvious at the time.

There are many considerations to be taken into account in this matter as to why that indictment was put on the secret calendar. If your Honor recalls, only recently in the Feeney case decided in Boston, the court—I just forget whether it was the Supreme Court or the Circuit Court—decided that because the report that had been made by the Congressional Committee investigating certain matters, a climate or atmosphere was created wherein and whereby certain defendants could not obtain a fair, impartial trial. Now, I think the Court—

The Court: That is the Delaney case. Just last week he went in and pled guilty on one count and was given a year and a day.

Mr. Barlow: That is the Boston case. I think the Court in taking into account the delay, takes into account or should take into account, according to the decisions of the various cases, the facts surrounding the delay, because the delay in time is not enough. In that case that your Honor cited that your law clerk found for you, I think your Honor said there was a delay of five or eight years.

The Court: Five.

Mr. Barlow: Five years. There are several [19] cases that are cited in the books where in four and five years delay has been considered an unnecessary delay in the administration of justice. But if your Honor will consider the facts in this case, the indictment was returned sometime in February. Here it is five months later the defendant can have a trial if he so chooses to go ahead now, providing the court calendar is available, providing it is available for his trial. When you are arguing unreasonable delay, the Court of necessity has to look into all the surrounding circumstances. What is an unreasonable delay? Assuming that Mr. Kong's case had been put on or had been taken off the secret file and had not been put on the secret file—if his indictment was returned in February and he pled in February, it is very reasonable to assume that with the condition of the local calendar he might not have had his day in court yet. His case might still be pending.

The Court: Oh, I doubt if that had been the fact that the case would have been tried. But not for the reason that you ascribed. I seriously doubt if the case had not been on the secret file, if it had been in the regular file and called up for plea and put at issue, if it would have been tried by the Court during the time that the Fujimoto case was under trial in the other division of this court.

Mr. Barlow: I assume from your Honor's remarks that that decision would have been made by the Court.

The Court: Yes. But that is something that didn't [20] happen.

Mr. Barlow: That's right.

The Court: And it also is at variance with Mr. Soares' contention that the defendant has an absolute right to a speedy trial, which doesn't take into consideration the condition of the calendar, the health of the judges, the availability of judges, or the judicial climate or atmosphere.

Mr. Barlow: A climate unfavorable to the defendant.

The Court: To which point you cite the Delaney case in the First Circuit. But what about this contention where Mr. Soares seems to say—to quote him—that it is only the ILWU and their spokesmen who talk about and get what they want because people lean over backwards and are afraid to do other than what they are shouting about?

Mr. Barlow: Well, I doubt that Mr. Soares—I doubt that Mr. Soares really means——

The Court: Well, that isn't the exact quotation of what he said, but it is something like that.

Mr. Barlow: It sounds good, but I doubt that Mr. Soares means what he says, because the government in this case certainly hasn't bent over backwards for anybody. The only backing over that the government has been doing in this case, is to assure each and every person a fair, impartial trial. That is the only backing over or backing that the government has done in any case. [21]

The Court: You mean by that to say that even though the ILWU was not on trial in this Fujimoto case that the government had an obligation, together with the Court, to see to it that the seven defendants on trial in the Fujimoto case had a fair trial.

Mr. Barlow: Your Honor, regardless of race, color, creed, political affiliation, whether you are a capitalist or a labor man, when you step into a federal court, you are entitled to the protection of the federal court. And the mere fact that these people were ILWU or any other labor organization doesn't mean that we should becloud or befuddle the atmosphere and try to creat a so-called climate to engender into the minds of people collateral issues which may or may not influence their thinking or decision.

The Court: Well, then, you have two rights that you have to balance under given circumstances, such as you and I are now talking about. One is the right of the defendant to a speedy trial and the other is the right of defendants on trial to a fair trial.

Mr. Barlow: Plus the fact——

The Court: Which is the bigger right? I have heard it said by people that constitutional rights are absolute rights. Is that so?

Mr. Barlow: No. In my opinion, the right to a speedy trial is a relevant right. You might under certain [22] circumstances—for instance, you go to some of the eastern seaboard states—you are indicted in 1949 and because of the conditions of the calendar, you are lucky if you get tried in 1953. So you have no absolute right to be tried or indicted on Monday and be tried on Wednesday. And then, also, your Honor, we are getting into the realm of a private right and a public right. Which is paramount when you come into a conflict with a public right and a private right?

The Court: Well, Mr. Soares says the right guaranteed to this man by the constitution is paramount, it is an absolute right. If he doesn't get it, he should be set free.

Mr. Barlow: I don't see any cases that Mr. Soares has brought forward to support his contention and I think we are just going around in circles. Let us look at the facts. The facts are that this man was indicted in February. Here it is July. Now, regardless of whether that was only a secret indictment, regardless of whether you were sick or I was sick or there wasn't any United States Attorney acting here, regardless of whether the plague had hit the Islands, is that four or five months an unreasonable delay and has this man suffered anything? As counsel says, he has not. Now, certainly private rights when they conflict with public rights give away to the public rights.

The Court: It is old-fashioned, isn't it?

Mr. Barlow: It might be old-fashioned, but [23] it is still Constitutional. And as long as we have the Constitution I think we ought to stay old-fashioned.

The Court: All right. Mr. Soares?

Mr. Soares: I fail to see the distinction that counsel tried to draw between a private right and a public right. The rights are all private. Anything that is reserved to the government the Constitution provides for specifically. And every time they invade the ordinary rights of the private citizen, they are required to get an amendment to the Constitution. Now, there is a private right of all persons who care to drink to do so, but when at a certain period in our history it was felt that drinking was harmful, then they deprived the public of that private right by the Eighteenth Amendment, and so on down. So there is no distinction to be drawn. When we begin to set up the right of an individual as against the right of the public, as counsel is calling it, then you have laid the foundation for Fascism. And you simply can't guarantee a pure democracy unless you put the individual right paramount to everything else.

Now, with reference to this speedy trial being relative and not absolute, if the Court please, I take the position that the right to a speedy trial is absolute. What constitutes speed is relevant. In other words, on this one set of circumstances a trial held on a certain date will still satisfy the requirements of a speedy trial. But that doesn't [24] make the



right relevant. It merely makes the term "speedy trial" relative to other surrounding circumstances. And we must not be misled by counsel's reference to unreasonable delay. Perhaps under the language of the Constitution as to a speedy trial, the reasonableness or unreasonableness of the delay enters into it. It is only in effect the speed with which a given case is tried and reasons for it. Now, there isn't a reason in the world why this indictment could not have gone in the files of this court in the regular manner. Not one. And counsel's effort to give or get that was unsuccessful because it is admitted that the only reason was his fear, and it doesn't sound well in the mouth of the United States District Attorney to indicate that the government was afraid that it might be accused of creating an unfavorable climate. To somebody whom they knew better than anyone else wasn't entitled to any other consideration——

The Court: Oh, wait a minute, wait a minute. We are getting that old fundamental principle that you insist rightly to be given to every jury, namely, the presumption of innocence.

Mr. Soares: Sure, I don't recede from that. I have argued it too often to attempt to recede from it. What I say is that these people were not entitled to any concession. And that is all that has happened here. They have been given a concession that a man whom they claim no connection with at [25] all would not know of his indictment merely because the government feared that that might create an unfavorable atmosphere. It is a sad commentary on

the jury, if nothing else, if the Court please, that the jury would have been influenced.

The Court: Oh, I have heard you and Mr. Landau say that, yes, they heard the judge say not to read the papers and I do. And one day I challanged the accuracy of the statement Mr. Landau made in your presence.

Mr. Soares: That was one of the few times we were found to have been wrong.

The Court: Weren't you here one day when a juror said he read the paper?

Mr. Soares: He had read it, but not that he had been influenced.

The Court: But I fired him just the same.

Mr. Soares: But that was in that particular case. Your Honor didn't excuse him from serving on all future juries because, forsooth, some future defendant might say or some defendant who had been indicted might say that man should go off the panel because he has indicated that he ignored the orders of the Court and did read a newspaper.

The Court: Well, supposing, it having been indicated by the government's counsel that Judge Wiig directed that this matter be presented to the Grand Jury and if an indictment be found that it be put on the secret file, supposing that wasn't [26] done? I can tell you that as a fact.

Mr. Soares: All the record shows is—I think it is the Clerk's minutes and that is all that I had available—that Judge Wiig dismissed the indictment and referred the matter——

The Court: No, dismissed the Order to Show Cause.

Mr. Soares: I am sorry. Dismissed the Order to Show Cause and referred the matter to the District Attorney. Now, we might be getting——

The Court: Wait a minute. I will tell you that as a fact. But that is quite apart from what I was getting at. Suppose, however, that were not the fact, and the man had been indicted during the course of the Smith Act trial and the jurors were very mindful of Judge Wiig's admonition not to read the newspapers about the trial, that they were engaged in, which would not have covered any other trial, and supposing that they heeded that and didn't read the newspaper or listen to the radio, but going on from day to day they rode the bus, and anyone of them, and the fellow in front had a newspaper with a big headline on it that somebody had charged such as your client or suppose the bus stopped in front of a radio store and it was the time when the radio was blasting out the evening news or the morning news, the information that one who was once a fellow juror had been excused because somebody was charged with doing thus and so with respect to him, and it [27] would have reached Judge Wiig's jury, and whether it did or not affect them would be speculative, was not in that instance the thing to do in the interests of public justice in a fair trial to the people who were on trial to abide the day when in a calm atmosphere your client could also have his fair trial?

Mr. Soares: But all that could have been procured without violating the Constitution. There was no need for an immediate presentation.

The Court: Wait a minute. That is what you say. But how do you discount the public interests in preventing evidence from disappearing or being diluted or being lost.

Mr. Soares: We have the arm of the government that is long enough to reach prospective witnesses and require their appearance.

The Court: Did you ever hear of people changing their stories?

Mr. Soares: Certainly, if the Court please.

The Court: Do you think the government has an interest in preserving testimony?

Mr. Soares: But are we to assume that everybody is going to do wrong?

The Court: No, but we have a right to assume, do we not, Mr. Soares, that in the public interest the government will proceed fearlessly, but with due respect to the rights of individuals under the law, those on trial and those to be [28] brought to trial.

Mr. Soares: We get to this conflict again.

The Court: Well, when we get right back to the proposition that you stand on, that the right is an absolute right—I am going to tell you something. You have heard people to whom you have referred talk long and loud, as you say, about certain Constitutional rights being absolute that you perhaps have become imbued with a little bit of their philosophy without knowing it.

Mr. Soares: Well, I will deny that, if the Court please.

The Court: But that again is one of the difficulties of the day, that sometimes good lawyers of necessity or for other reasons, imitate those who should not be imitated. So I think that without knowing it you are adopting a kind of argument here that is a type that you have generally castigated in the course of your arguments.

Mr. Soares: What I am doing here is advocating the recognition of the language which is clear and unequivocal, related to this particular type of thing, that a person shall not be deprived of his right to a speedy trial. Now, perhaps some of the things that your Honor has in mind in this great fanfare about "I stand on my Constitutional rights"—not to answer the question which has been—

The Court: You take any one of them. You take any [29] one that happens to be applicable at the moment. That is the most popular one today. Go ahead with your illustration.

Mr. Soares: But that right as against self-incrimination in a criminal prosecution.

The Court: That's right.

Mr. Soares: And I don't hesitate to say that, contrary to your Honor's thought of the possibility of my being influenced, I don't hesitate to say that the government has not properly protected itself against that type of thing because if, as for instance, in a Congressional hearing, a witness is asked, are you a Communist, and he says that I stand on my Constitutional rights, which he doesn't have, because the Constitution doesn't say that in any place other than a criminal prosecution, he need not incriminate

himself, but why doesn't the government follow it up and say, are you an anti-Communist? He certainly couldn't call any privilege there because certainly nobody could be in jeopardy or endanger himself of incrimination by saying that he is anti-Communist.

The Court: Supposing he was a Russian?

Mr. Soares: Supposing he was? I am talking about the question being put——

The Court: To a Russian?

Mr. Soares: Yes, to a Russian.

The Court: Who is going back to Russia? [30]

Mr. Soares: All right. The United States doesn't guarantee the persons within its borders anything except protection within its borders.

The Court: That's right.

Mr. Soares: In the constitution. So there is no need to talk about what would happen to a Russian. Whatever happened wouldn't be enough, but the point remains that we do have this situation and it is getting worse and worse all the time.

The Court: Well, let me also say, since we are going a little bit afield, that there is pending presently in the Congress, introduced by four senators, a bill which, if passed, is to the effect that when a witness in a prosecution in a court declines to answer on the ground of self-incrimination will compel that person to answer if the Attorney General writes a letter to the court saying that public necessity requires the witness to answer. There has also been passed by the senate a bill of like nature to the effect of the Attorney General requiring wit-

nesses to answer in Congressional hearings. So that perhaps some progress is being made legally along that line that you advert to. However, you would be interested to know that at the conference in San Francisco last week the Ninth Circuit Conference was not in accord as to the merits of that bill and referred the matter to a committee to thresh out what its position should be because of a fear that a bill [31] of that nature would put too much power in the hands of the Attorney General, and secondly would enable a person who gets such immunity, to use a common phrase, to have a field day in ratting on his former friends. And that an ex-communist's testimony is at best viewed with suspicion unless corroborated by other evidence. The law should be at least so drafted as to provide that in that event it require that such testimony be corroborated. So that even among judges and legislators it is not a common view about this serious problem to which you advert. Now, that is a digression for such as it is worth.

Mr. Soares: Then I will pass on to the only remaining point, to reply to Mr. Barlow, if the Court please, and that is with reference to the third ground of the motion. Mr. Barlow has represented to your Honor that the indictment is in the language of the statutes, wherein it refers—and I am chided for overlooking the provision for corrupting, and so forth, rather than by threats—but the fact remains that the word “corrupt” as used here is only with relation to the actions not towards Peneku, the juror, and not with reference to the commission of the crime. All they say here—and that is one of the

reasons why we are complaining—is that it does not describe an offense against the laws of the United States. They do not say that in the language of the statute. You see where it refers to making an obstruction of due administration of justice, the language of the statute—corruptly or by [32] threats or by force or by any threatening communications, influences—and they don't say that he corrupts or by threats or by force, and so on, impeded the administration of justice. The only time they have used the word “corruptly” is in connection with his endeavor to influence Peneku.

The Court: In violation of the statute.

Mr. Soares: Pardon?

The Court: In violation of the statute.

Mr. Soares: It isn't the corruption of Peneku that they claim is a violation of the statute. It is the impeding of, the obstructing of justice that they claim. So whatever means he may have used in his relations to Peneku, he must still come within the language of the statute, and there is no allegation here that he does so. And counsel says the reference to the case on trial is sufficiently made in the indictment. I submit not. All that that case does is to describe the person, the juror, in a certain case. But not the obstruction of justice was attempted in that case.

The Court: The motion to dismiss this indictment on each of the three grounds alleged is denied. There is no double jeopardy. The action of the Court in that case was a disciplinary action and was not an indictment action and not a criminal offense



and the two are not synonymous but are different. They are different in their very nature. (*O'Malley vs. United States*, 128 Fed. (2d) 676. The [33] indictment, on consideration of the third ground of the motion, is sufficient. It clearly, plainly, and simply in the words of the statute, advises the defendant of the nature of the charge in an adequate manner, enables him to prepare his defense with regard thereto and protects him against double jeopardy.

Finally, as to the stressed second ground, the alleged right to a speedy trial, it is, of course, a constitutional right, but it is not an absolute right. Under the circumstances surrounding the seven and one-half months' Smith Act trial recently concluded, in this court, presided over by Judge Wiig, and entitled *United States vs. Fujimoto*, Criminal No. 10,495, wherein the person mentioned in this indictment, Peneku, however you pronounce his name, was one of the jurors, he was discharged for reasons that have been referred to and which appeared to form the basis of this indictment; and in the light of the First Circuit recent decision in the *Delaney* case, I am well satisfied in point of law that not only is this right to a speedy trial not an absolute right but is one which must be balanced in the judgment of the court and in the judgment of the prosecuting branch of our government, with reference to the best interests of public justice and the individual constitutional rights of other defendants, particularly those then on trial in the same identical court, especially where a case such as this grows out of a trial then in progress. [34]

Accordingly, as announced, the motion on each of the grounds alleged is denied.

Mr. Soares: At this time may we present a motion for a bill of particulars?

The Court: You may.

(Mr. Soares hands a document to the clerk.)

The Court: And set it down for argument five days hence, which is the standard time allowed, unless the parties wish to advance it.

Mr. Barlow: Unless the parties wish to advance it to an earlier day? We can hear it right now, if your Honor is free and willing.

The Court: I am free and willing, but I find that it would be better to have a little more time, to be a little more careful and take a little time and examine the matter dispassionately and with the aid and assistance of law clerks.

Mr. Soares: Five days from today would be Monday, the 20th?

The Clerk: Wednesday.

The Court: I will handle it earlier if you are ready.

Mr. Soares: Well, I would be ready at any time.

The Court: All right. How about Monday?

The Clerk: Monday at 9 o'clock, your Honor?

Mr. Soares: It is a little bit confusing. The [35] Court said five days. You said you would be ready at any time. I didn't get through saying what I was going to say. I have a jury trial in a criminal case which will be finished tomorrow and the next day, and I go into a civil trial on Monday which is now set for 9 o'clock. But if your Honor would fix an afternoon hour——

The Court: All right.

Mr. Soares: I am sure I can get the Circuit Court—in fact, I believe I have been told there will be no afternoon sessions.

The Court: Monday afternoon, then, at 2 o'clock.

Mr. Soares: All right.

The Clerk: You have a motion in a case at 2 o'clock.

The Court: Well, then, put this down for 1:30.

Mr. Barlow: I may state in open court, your Honor, that the government is willing to furnish Mr. Soares with No. 2.

The Court: Well, your reference to No. 2 indicates that there is a No. 1 that he might like to be heard on. All right. The Court will stand adjourned for the day.

(The Court adjourned at 4:20 p.m.) [36]

July 20, 1953

The Clerk: Criminal No. 10,704, United States of America vs. Stephen Kong, Jr., for hearing on motion for bill of particulars.

The Court: Are the parties ready?

Mr. Soares: First may I offer my apologies. I confused the name Kong with the name Chang which is a Circuit Court matter. I am perfectly willing to submit the motion on the motion, itself, if the Court please. I think from our point of view it should be apparent that we need the information. There is no special reason except that it seems apparent that it could be properly given without

jeopardizing the prosecution's case, and still assist the defendant to prepare the defense.

The Court: As to your being late for court, those things happen in the best of regulated families. I accept your apology.

With regard to your motion, I think, as you say, we might just as well strip it of all its fancy words and get down to the gist of it. Heretofore the government has said that it would give you the matter asked for in point No. 2. However, I daresay you would not be too surprised when you get to the answer to that because I can almost guess it. Nos. 1 and 3 are somewhat similar and very frankly the only [1\*] matter that I wish to have attention addressed to is with respect to the request for the manner and method by which it is alleged in the indictment that the defendant sought to influence and intimidate Samson N. Peneku.

Mr. Barlow, what have you to say?

Mr. Barlow: I think Mr. Soares is asking for the government's case in both No. 1 and No. 3.

Insofar as the time and place is concerned——

The Court: I have already indicated that I don't want any argument about that. I am not requiring you to give time and place, but I am only concerned about manner and method of alleged violation.

Mr. Barlow: The manner and method, I respectfully submit, is evidence and I don't think any bill of particulars requires the government to give any of its evidence that it has lined up for any particular case.

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\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

The Court: That is elementary, but how is this man going to prepare his defense unless he knows the nature of the charge as to both manner and method by which it is claimed that he violated the statute.

For example, there is a case my law clerk showed to me this morning where in a motion for the bill of particulars was denied. Nevertheless the indictment said that the method—or whatever the adjective was that they used—was an offer to pay the juror \$200. There you know that the method [2] is by financial operation.

Now, certainly the allegation as to the \$200 feature in this case to which I have made reference, which is *Bedell vs. United States*, 78 Fed. (2d) 358, does acquaint the accused with the knowledge that the alleged charge related to a certain sum of money. Isn't the defendant here similarly entitled to know whether the charge relates to a method of that sort resorted to to intimidate a juror, or whether it was by threats of physical violence, or both, etc., without spelling out the detailed evidence.

Mr. Barlow: I feel that in view of the investigation that if we spell out exactly how the offense was committed that we are giving the defendant the evidence that we have in the case.

The Court: Well, I know that the government always takes that position and **hides behind the** operation. The government never likes to have a bill of particulars ordered, because it is contrary to its wishes, and if it had desired to let the defendant know, it would have put that particular in the indictment.

Bills of particular are wrung out of the government by force, so I am not surprised at your approach to the matter by saying it cannot be done because it would reveal evidence, but that is a mere statement. It does not prove anything. It is a general covering up operation. I again ask you why you [3] couldn't tell them the general manner and general method without revealing the evidence.

Mr. Barlow: I think the defendant knows precisely and exactly——

The Court: The question is whether from this indictment, based on what it charges, the defendant can clearly without ambiguity prepare his defense.

Mr. Barlow: The indictment says by corruptly approaching and attempting to influence Peneku.

The Court: How?

Mr. Barlow: Well, the indictment alleges he endeavored to influence, obstruct and impede the due administration of justice in that he did knowingly, wilfully, unlawfully, feloniously and corruptly endeavor to influence, intimidate and impede the said Peneku.

The Court: Well, those are all conclusions in the words of the statute. They may be sufficient to satisfy the requirement, but in this day of short-form indictments and with liberality being the key with respect to bills of particulars, I again ask you as to the wording you have just quoted from the indictment, how is he supposed to have done these things?

Mr. Barlow: All I can say is he knows how he did it.

The Court: That isn't the question. You are [4] assuming again, a fact not in evidence. He is pre-

sumed to be innocent. I don't know that he knows a thing. The question is whether he can be advised by the government as to the nature of the charge and given some particulars to clearly and specifically prepare the defense.

Mr. Barlow: All I can say to the Court is that if we give Mr. Kong what the Court is asking for here then we will give Mr. Kong our entire case.

The Court: Well, that still leaves me up in the air with a lot of generalities and a lot of words and nothing to put my finger on. I strongly suggest to you that the man is entitled to know generally the manner and method that the government charges he resorted to for the purpose of accomplishing the thing charged. It is no answer to say, "Oh, well, he knows. He did it." You are dealing with a man presumed innocent.

Mr. Barlow: As I said, the function of a bill of particulars—in the first place, the demands rest with the sound discretion of the Court.

The Court: Right.

Mr. Barlow: Secondly, the defendant, is being given any information that he asked for in a demand for a bill of particulars, is given that particular so that at no future trial is he again put in jeopardy. Then he is in a position where he can plead a former acquittal or former [5] conviction. As a matter of right, he is not entitled to the bill of particulars so long as he knows, generally, with what he is charged.

In order for him to properly prepare a defense, he is being charged with the obstruction of justice.

He is being charged with impeding justice and he is being charged with approaching Mr. Peneku on a certain date. For the government to give them anything, the government, if necessary, will just have to give all the evidence that the government has.

The Court: Supposing that was the practical effect and result. What is so injurious about that?

Mr. Barlow: If your Honor feels he is entitled to it——

The Court: The question is what is so injurious about letting the defendant know what the evidence is? If it is good evidence, it is going to be good today, tomorrow and the next day. If it is no good, you might as well know now.

Mr. Barlow: If the defendant knows what the government's case is, it will give him ample opportunity to either set up an alibi, approach some of the witnesses that have been interviewed——

The Court: Then you might have two cases instead of one. [6]

Mr. Barlow: Yes, but we will never get it done, if we are building cases. We want to get done with this case.

The Court: The law will never end until the world ends. You and I may change, but the law doesn't.

Mr. Barlow: We *can* around all afternoon. All I can say is if I give him the information *he asking* for, I am giving all the information I have and he can put on my case when the trial is held because he will have all the evidence.

The Court: Your argument about exceeding the area with the possibility of an alibi relates more



properly to time and place. Certainly, in the event, he knows enough as to time and place as the indictment states that "on or about November 8, 1952, in the City and County of Honolulu."

Now, if in order to tell him, generally—not specifically, but generally—the manner and method by which the influencing and intimidating and impeding is charged in the indictment was accomplished, it is necessary, in the government's opinion, to reveal some evidence, there is nothing terribly wrong about that. You reveal evidence in the indictment when you say "on or about November 8, 1952, in the City and County of Honolulu," and it is sometimes necessary in the interest of justice to reveal certain amounts of evidence to enable the man charged to know what he is charged, to at least know what he is charged with and to be able to prepare an adequate defense in order to protect himself [7] against double jeopardy.

If, as a result of the revealing of certain particulars, further complications arise whereby you get additional charges growing out of a pending case, so much for that. The law will take care of those situations as they arise.

Mr. Barlow: It is rather difficult to catch up to those things.

The Court: I know, but that is no answer when you have a government as large and as efficient as ours. I will grant that your particular office is presently hard pressed for personnel in relation to matters that you have to consider, but I must look at the matter from the standpoint of the government as a whole and the defense of justice as a whole.

I am going to grant the motion for the Bill of Particulars in the following regard:

As to No. 2, the government having offered to give that information to the defense, I will order it given.

No. 1 and No. 3 I grant only in part in that I direct that the government give to the defendant a general description of the manner and/or method, or both, by which it is charged he sought, in the words of the indictment, to influence, intimidate and impede Juror Peneku in the discharge of his duties. This refers to *United States vs. Charles Fujimoto, et al.*, Criminal No. 10,495. I call attention to the fact that I said "generally" and not specifically. [8] I do not compel you to give evidence unless the giving of it is necessary in order to meet my direction that you "generally" acquaint him with the alleged method or manner.

Mr. Soares: Will the Court please set a time?

The Court: Yes, five days. And the matter may be set down for plea and setting.

What day is today?

The Clerk: Today is the 20th.

The Court: Well, I will direct that the five days be shortened to four days, and that the Bill of Particulars be complied with as directed by the Court on or about Friday of this week at 4:00 o'clock, and that the matter be set for plea and setting on the 29th. At what hour, Mr. Clerk?

The Clerk: At 9:00 o'clock.

The Court: Very well.

The Clerk: We have a plea at 2:00 o'clock.

The Court: All right, at 2:00 o'clock. [9]

Mr. Soares: Yes.

The Court: All right. Is that agreeable?

August 14, 1953

(Following recess after impaneling of the jury.)

The Court: Note the presence of the jury and the defendant, together with counsel. At this time the government may make an opening statement, if it desires.

Mr. Soares: May I make the motion regarding witnesses being removed from the room? I realize it has never been passed upon. I want to avoid, at least, responsibility on the part of defense counsel to make the motion, namely, that the witnesses be excluded from the courtroom except when actually giving testimony in the court; otherwise, that the witnesses be placed under the rule.

The Court: For reasons heretofore assigned in other cases, with which you are familiar, the request is denied. We had a witness at one time decide to tell the truth because there were witnesses in the courtroom.

Very well. The government may at this time make its opening statement.

#### Opening Statement

Mr. Richardson: If your Honor please, and ladies and gentlemen of the jury: The facts here are very, very simple, and the proof will be very short. We will prove that during the recent Smith Act case, which was tried in Judge [1\*] Wiig's court, one of the jurors originally impaneled upon

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\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

the jury panel was a man named Samson Peneku. The jury was sworn during the early part of November and then released to come back the following week to start the actual trial.

On a Saturday night during the interval after the swearing of the jury and the time when the case was to start Mr. Peneku at his home was approached by the defendant Stephen Kong. Mr. Kong came to Mr. Peneku's house with Mrs. Peneku's niece, with whom he was keeping company at that time. On that Saturday night there were several people in the room and Mr. Kong asked Mr. Peneku if he could speak with him privately. They left the room and Mr. Kong and Mr. Peneku went back to another room and at that time, in brief, Mr. Kong asked Mr. Peneku if he would do him a favor.

Mr. Peneku said, "What is it?"

And Mr. Kong said, "I want you to vote 'not guilty'."

Mr. Peneku became angry at this and they left the room and went out with the other people and shortly after that Mr. Kong left. There was some other conversation, but, in brief, that is what the case is.

Mr. Soares: We will reserve our opening statement.

The Court: Very well. The government may call its first witness.

Mr. Richardson: We will call Mr. Peneku. [2]

SAMSON N. PENEKU

a witness called by and on behalf of the plaintiff,  
having been duly sworn, testified as follows:

The Court: Will you please state your name?

The Witness: My name is Samson N. Peneku.

The Court: Speak good and loud so that every-  
one can hear every word you say. How old are you?

The Witness: Sixty-three.

The Court: Where do you live?

The Witness: 1128 Gulick Avenue.

The Court: What is your occupation?

The Witness: I am a welder for the Honolulu  
Gas Company located at the relay plant.

The Court: Are you a citizen of the United  
States?

The Witness: Yes, I am a citizen of the United  
States.

The Court: Only?

The Witness: Yes, sir.

The Court: Take the witness.

Direct Examination

By Mr. Richardson:

Q. Were you selected as a juror in the recent  
case tried in Judge Wiig's court, which is known  
as the Smith Act case? A. Yes.

Q. Do you recall what day of the week it was  
that the jury [3] sworn?

A. It was sworn on the 5th.

Q. Of what month?

A. The 5th of November, 1952.

Q. Now, Mr. Peneku, you were on the panel  
when it was sworn, is that correct? A. Yes.

(Testimony of Samson N. Peneku.)

Q. Now, Mr. Peneku, when was the trial actually to start, if you know?

The Court: What trial?

Mr. Richardson: The Smith Act trial.

The Court: Does the case have a name and number?

Mr. Richardson: Yes, sir, the case of United States of America vs. Charles Kazuyuki Fujimoto, and others, Criminal No. 10,495.

Q. (By Mr. Richardson): When was the trial actually to start, if you know, the taking of the proof and the starting of the trial?

A. Well, the jury was sworn in and it was approved on the 5th of November, 1952, in Judge Wiig's office.

Q. And you were on that jury?

A. I was on that jury.

Q. Do you know when the proof was actually to start? When was it you were told to come back to start the case? A. Yes, we were. [4]

Q. What date was that?

A. That was on the 6th. That was the date after I was sworn.

Q. No, I mean the actual taking of the proof.

A. Well, the actual taking was on November 12th.

Q. Was there a week end between the date you were sworn and you were supposed to return?

A. There was a week end and there was a holiday.

Q. There was a week end between the day you

(Testimony of Samson N. Peneku.)

were to be sworn and the date proof was to be taken?      A. Yes.

Q. Do you know the defendant in this case, Stephen Kong?      A. No, sir.

Q. What I mean is, have you ever seen him and talked to Mr. Kong?      A. No.

Q. You have talked to him, have you not?

A. No, I haven't.

Q. Do you know this gentleman sitting at the table?

A. Not until that night he approached my place.

Q. Have you ever seen him before?

The Court: He means before today.

The Witness: Well, just on the night he approached my place.

Q. (By Mr. Richardson): You have seen this gentleman before? [5]      A. Yes, sir.

Q. Did Stephen Kong come to your house during the week end between the dates that the jury was sworn and the time the trial started?

Mr. Soares: May I object to the question as leading?

The Court: The objection is sustained.

Q. (By Mr. Richardson): Has he ever been to your house?

A. Really, I don't know. I have not seen him be at my house while I am at home.

Q. Has he ever been at your house?

A. Possibly so, I don't know.

Mr. Soares: I would like the Court to take note of the actions of the lady in the front row express-

(Testimony of Samson N. Peneku.)

ing something, showing some emotion over the manner in which the witness is answering. I assume it is Mrs. Peneku, a proposed witness in this case.

The Court: Well, unless there is some communication between a spectator and a witness—

Mr. Soares: She is communicating by means of motions. She has been doing it each time that counsel has been having difficulty in getting the witness to understand just what he wanted in answer to his question. I think it is improper.

The Court: If that is happening, it is. [6]

Mr. Soares: I simply ask the Court to instruct the spectators to observe the witness rather than make objection.

The Court: I will caution everyone in the courtroom to in no way react by signs or motion to anything that is said by a witness. You may proceed.

Q. (By Mr. Richardson): Mr. Peneku, on a Saturday night early in November, did Mr. Kong come to your house?           A. Yes, sir.

Q. Who was with him, if you know?

A. Mrs. Minnie Gohier.

Q. Who is Mrs. Minnie Gohier—I will ask you this: Is she related to your wife?

A. Yes, sir.

Q. What is the relationship?           A. Niece.

Q. Mr. Peneku, who was present at your house when Mr. Kong came?

A. Well, there was my daughter-in-law and my father-in-law.



(Testimony of Samson N. Peneku.)

Q. What is your daughter-in-law's name?

A. Anita Peneku.

Q. And you said your father-in-law?

A. My father-in-law, Lawrence Maioho.

Q. And he was there? A. Yes.

Q. Was Mrs. Peneku there? [7]

A. Yes, she was present.

Q. Do you recall what day of the week that was?

A. That was on a Saturday night.

Q. Do you know if that was the Saturday after you had been sworn in as a juror?

A. Yes, sir.

Q. It was? A. Yes, sir.

Q. Now, Mr. Peneku, what were the people in the house doing? Were they sitting there talking?

A. We had a few bottles of beer with the exception of my Mrs. and I.

Q. You had a few beers? A. Yes.

Q. Who brought the beer to the house?

A. Mrs. Gohier.

Q. Did you see Mr. Kong? A. Yes.'

Q. What were you doing?

A. I was lying down on the punee.

Q. Were you reading? A. Yes, sir.

Q. What were the rest of them doing?

A. They were sitting around the table and talking.

Q. After the conversation, did Mr. Kong come to you and say [8] anything?

A. I didn't understand you.

Q. Did Mr. Kong, the defendant here, come over

(Testimony of Samson N. Peneku.)

to you while you were on the couch reading and say anything to you?      A. Yes.

Q. What did he say?

A. He said, "Hey, you, I want to talk to you."

Q. Did he say anything else?

A. No, that was all.

Q. What did you say?

A. I hesitated for a while and I looked at him and finally I stood up and went with him.

Q. Where did you go?

A. We went to my father-in-law's room.

Q. Was anyone else in the room?

A. No, sir.

Q. Did you have a conversation with Mr. Kong in the room?      A. Yes, sir.

Q. Just tell us as well as you can remember, Mr. Peneku, what was said to you and what you said to him.

A. Yes, sir. Well, he said he wanted me to vote not guilty against the Smith Act because Harriet was a great friend of his.

Q. Who was a great friend of his?

A. Harriet. [9]

Q. Do you know anyone named "Harriet"?

A. At that time I didn't know who Harriet was, but after I recalled Harriet Bouslog, the lawyer. He didn't mention it, but to my opinion that is the only one I could think of, Harriet Bouslog.

Mr. Soares: I move that the opinion be stricken and the jury instructed to disregard it.

(Testimony of Samson N. Peneku.)

The Court: Yes. His opinion as to what the speaker who used the name "Harriet" meant may go out. We are only interested in what he understood himself.

Q. (By Mr. Richardson): What was it that was said about Harriet?

A. That Harriet was a great friend of his, that she was going to take up his case on Maui for his mother.

Q. And you stated he asked you to vote not guilty?      A. Yes, sir.

Q. What did you understand him to mean by that?

Mr. Soares: We object to the witness' understanding, and ask that the jury draw its own conclusions as to the proper understanding to be drawn from those remarks.

Mr. Richardson: This is the witness' understanding that I am asking for.

The Court: The witness may answer.

Q. (By Mr. Richardson): What did you understand him to mean when he asked you—— [10]

The Court: No.

Mr. Richardson: I phrased it wrong. What did I ask you?

The Court: In any situation like that I will not let a witness testify as to what he thinks the speaker meant, but I will let the witness testify as to what he understood was meant by the words used.

Mr. Soares: We object to that situation for the same reason.

(Testimony of Samson N. Peneku.)

The Court: Very well.

Mr. Richardson: May I proceed?

The Court: Make sure the witness understands the question.

Q. (By Mr. Richardson): What was your understanding of Mr. Kong's statement to you?

A. Well, he said that Harriet was a good friend of his; that she was going to handle his mother's case on Maui.

Mr. Soares: I can't hear the last words. The witness dropped his voice.

The Court: Speak up.

The Witness: And that Harriet was going to defend his mother on Maui.

Q. (By Mr. Richardson): What was your understanding of what he said about voting not guilty?

Mr. Soares: We object to that, if the Court please. [11] He can't usurp the functions of the jury. The jury is given the facts and they will determine whether or not this man acted corruptly. He can't set up an opinion for them by stating, "As for me, I understood thus and so."

The Court: The witness may testify, as I have already ruled, as to what he understood the speaker to mean, so far as the witness is concerned.

Q. (By Mr. Richardson): The question is what was your understanding of what Mr. Kong said to you?

A. That is what he said, that Harriet was a good friend of his; that she was going to take up the case of his mother.

(Testimony of Samson N. Peneku.)

Q. You said he asked you to vote not guilty?

A. Yes, sir.

Q. What was your understanding of that with reference to what he said, with reference to voting not guilty?

A. He told me to vote not guilty. I said, "No, no, I can't do that."

Q. What did you understand the words, "not guilty" meant? Vote not guilty in what way?

Mr. Soares: We urge the same objection, if the Court please. Let him tell the whole conversation.

The Court: It is the same objection, but I think what you mean is that the question is leading. That objection would be good.

Mr. Richardson: This is a difficult witness. [12] If I could have a little latitude—I am not trying to testify for him.

The Court: I agree that he is slightly difficult, but it would be much better, under the circumstances, if you would exhaust the possibility of telling what happened completely and clearly.

Q. (By Mr. Richardson): Was that everything that was said back there in the room between you and Mr. Kong? Was anything else said?

A. I don't remember anything else that was said, but there was one understanding in my mind in regard to vote "not guilty" and I took it for the Smith Act case.

Q. That was your understanding?

A. Yes, that was my understanding.

Q. How did you feel about what he said to you?

(Testimony of Samson N. Peneku.)

A. I didn't tell——

Mr. Soares: Objected to as being incompetent, irrelevant and immaterial, the witness' reaction, a personal feeling in the matter.

The Court: The objection is sustained.

Q. (By Mr. Richardson): Did you have any reaction to what he said, Mr. Peneku?

A. Well——

Mr. Soares: If you can't testify to what his reaction was, whether he had one or not becomes immaterial. [13] We object to the question on that ground, in view of the Court's last ruling.

The Court: No, this is a different question. A reaction to what he said might be additional words. I don't know. However, don't by this question be seeking to circumvent my prior ruling.

Mr. Richardson: No, I am asking his reaction to it.

Q. (By Mr. Richardson) What was your reaction to what he said?

A. I got mad right off the bat and I opened the door and I said, "Get out."

Q. Did he leave?

A. I told him to get out. He went ahead and I closed the door. He walked out to the kitchen. They sat there a little while and scrambled.

Q. What was the last?

A. They sat down a little while and then scrambled, left the house.

Q. Whom do you mean by "they"?

A. Mrs. Gohier and Kong.

(Testimony of Samson N. Peneku.)

Q. The following week did you go to see Judge Wiig?  
A. Yes, sir.

Q. Did you report to him what happened?

A. Yes, I did. [14]

Mr. Soares: I would like to have an opportunity to object before the witness answers. I ask that the answer be stricken and we object to this as being irrelevant and immaterial, what he did after that.

The Court: What is the relevancy?

Mr. Richardson: I want to show that he did report the incident.

The Court: You may go up to that point.

Q. (By Mr. Richardson): Did you report that to Judge Wiig?  
A. Yes, I did.

Mr. Soares: It is still irrelevant and immaterial and it has nothing to do with the case.

The Court: I have already ruled that he can cover it up to this point.

Mr. Soares: Now he will want to say what he did tell Judge Wiig.

The Court: No. Please listen to the question.

Q. (By Mr. Richardson): Mr. Peneku, your house is on Gulick Street?  
A. Yes.

Q. That is on the island of Oahu, in the City and County of Honolulu, is it not?  
A. Yes, sir.

Mr. Richardson: That is all. [15]

### Cross-Examination

By Mr. Soares:

Q. When you reported to Judge Wiig was what you said taken down by a reporter?

A. I don't know.

(Testimony of Samson N. Peneku.)

Q. Was there anybody else present when you reported to Judge Wiig?

A. No, just the Judge and I.

Q. You testified that Mr. and Mrs. Gohier left your house. Do you mean by that that nobody left with them?      A. No.

The Court: Just a moment. You said Mr. and Mrs. Gohier. I had not heard about Mr. Gohier.

Mr. Soares: I meant Mr. Kong and Mrs. Gohier.

The Court: Let's get the spelling of that name.

Mr. Soares: G-o-h-i-e-r, I believe.

Q. (By Mr. Soares): Did anybody else leave with them?      A. No, sir.

Q. You are sure of that?      A. Yes, sir.

Q. Does Mrs. Gohier have some children?

A. Yes, sir.

Q. Did they sometimes come to your house?

A. They do often come to my house.

Q. Were they there on the Saturday we are talking about? [16]

A. They come weekends and sometimes during the holidays.

Q. This particular Saturday were those children there?      A. Yes.

Q. Do you know when they came to your house?

A. I don't know just when.

Q. Had they been at your house more than one day?

A. Well, they come there and go out and come back and go out.



(Testimony of Samson N. Peneku.)

Q. I am talking about this particular occasion, Saturday, the 5th of November, I think you said it was. Did they come into your house that day or had they come to your house and stayed?

A. They came before and stayed.

Q. How long had they been there up to Saturday?

A. A day or two; sometimes overnight.

Q. I am talking about this particular time.

A. I don't know how long.

Q. More than one day?           A. I don't know.

Q. How long did they stay on that occasion altogether?           A. Do you mean the children?

Q. Yes.           A. They slept overnight.

Q. What night did they sleep there?

A. The night he approached me. [17]

Q. That is Saturday night?

A. That was Saturday night.

Q. Had they slept there Friday night?

A. No, sir, Saturday night.

Q. Did I understand you to say you had never seen Mr. Kong at your house before that day?

A. No, sir.

Q. Had you ever heard about him?

A. Yes, sir, I heard about him.

Q. You heard about him as a man who was keeping company with your wife's niece?

A. No, sir.

Q. When did you first hear about Mr. Kong?

A. Well, I couldn't tell you when.

Q. About how long ago?

(Testimony of Samson N. Peneku.)

A. Oh, sometime before this case came up.

Q. Well, about how long before November 5?

A. I don't know about how long.

Q. Can't you give us any idea?

A. I say I don't know how long.

Q. Can't you give us any idea?           A. No.

Q. Did you know that he was keeping company with your wife's niece?

A. I don't know nothing about their affairs. [18]

Q. Had you ever heard about it?

A. I had heard that he was going with her, but I don't—

Q. You didn't like it?           A. You bet I don't.

Q. What is that?           A. You bet I don't.

Q. You don't like Mr. Kong very much?

A. Because I don't like him.

Q. You didn't like it because he was keeping company with your wife's niece?

A. He is, but I am not saying nothing.

Q. You said you bet you didn't like the idea and my next question is because you didn't like the idea you didn't like him?

A. No, no, sir. I didn't say so. Just because I didn't know, that is the reason.

Q. And you had never seen him in that house before?           A. No, sir.

Q. When he came there on Saturday the 5th, were you already home?

A. Yes, I was in my pajamas.

Q. About what time did he arrive?

A. It was up to sunset.

Q. What is it?

(Testimony of Samson N. Peneku.)

A. Up to sunset in the evening. [19]

Mr. Soares: I didn't get the answer. Will the reporter please read the answer.

(The answer was read.)

Q. (By Mr. Soares): Oh, after sunset. And you were lying in your pajamas reading?

A. Yes, sir.

Q. What were you reading?

A. Life magazine.

Q. And in what room were you lying?

A. We were all in the kitchen.

Q. On what were you lying?

A. On the punee.

Q. Was anybody else lying on the punee with you? A. No, sir.

Q. And where was Kong when you first saw him? A. He was sitting around the table.

Q. Who else was sitting around the table, if anyone?

A. There was my daughter-in-law, my father-in-law and Mrs. Gohier and my wife.

Q. You had not seen Kong until you saw him sitting around the table?

A. No, I saw him that night when he came into the house.

Q. I beg your pardon?

A. I saw him that night when he came to the house.

Q. Where did you first see him? [20]

A. In the house.

Q. What part of the house?

(Testimony of Samson N. Peneku.)

A. Where he was sitting down on the chair.

Q. You don't know how he got to the chair?

A. When he came that night with Mrs. Gohier they brought a package with a lot of beer in it.

Q. What do you mean "a lot of beer"?

A. Well, they had beer in the package.

Q. What do you mean "a lot of beer"?

A. Well, more than two or three bottles in the package.

Q. Ice cold beer?

A. Well, I don't know. I never tried it.

Q. Well, when did you first see Mr. Kong?

A. Right at that evening my house.

Q. Where? A. In my house.

Q. What part of your house?

A. Well, I will tell you. He was in the kitchen sitting on a chair.

Q. You did not see him until you saw him sitting on the chair?

A. Well, I saw him walk in, but I wasn't introduced to him.

The Court: Go ahead.

The Witness: I didn't know who he was until he sat down on a chair and then he was introduced as Mr. Kong. [21]

Q. (By Mr. Soares): Who introduced you?

A. Mrs. Gohier.

Q. What did she say?

Mr. Richardson: I object to this as being irrelevant.

The Court: The objection is overruled.

(Testimony of Samson N. Peneku.)

The Witness: She said, "This is Steve Kong." I never said no more. I just sat down and looked at him.

Q. (By Mr. Soares): Did she say anything about him? Didn't she say this is the man I am keeping company with?

A. No, sir, she didn't say nothing.

Q. I believe you said you heard about Mr. Kong before in connection with his keeping company with your wife's niece? A. No, sir.

Q. You never heard the name "Kong"?

A. I heard the name Kong, but I never heard that kind of remarks before.

Q. In what connection did you hear the name Kong? A. In connection with——

The Court: Mr. Peneku, will you pronounce your words a little clearer. You are running them together. Take your time and answer the question as clearly and loudly as you can.

Q. (By Mr. Soares): Who did you first hear mention the name Kong? [22]

A. I don't know who.

Q. When?

A. Well, sometime before the thing came up.

Q. How long before the case came up?

A. I don't know how long.

Q. Where were you when you first heard it?

A. Well, outside in the yard. I was playing around in the yard all day.

Q. Who mentioned his name?

A. The children.

(Testimony of Samson N. Peneku.)

Q. What did the children say?

A. Mrs. Gohier's children.

Q. What did they say?

A. "Momma was around here with Kong today."

That is all.

Q. And that is the only time you heard the name "Kong" mentioned? A. Yes, sir.

Q. Now, when your wife's niece introduced Mr. Kong saying "This is Stephen Kong" did you say anything? A. No, sir. I never said a word.

Q. You were lying on the punee?

A. On the punee.

Q. Reading a Life magazine? A. Yes.

Q. Did you look up to see who it was? [23]

A. I didn't care to look up.

Q. Why didn't you?

A. Because I was not interested. I had my mind on something else.

Q. So your wife's niece introduced somebody and you paid no attention?

A. It made no difference because I never met the man before.

Q. She was trying to get you to meet him then?

A. Yes.

Q. You still weren't interested?

A. No, sir.

Q. You kept reading your paper and never took your eyes off of it? A. No, sir.

Q. Did you make any reply? A. No, sir.

Q. Did Mr. Kong say anything at that moment?

A. Well, I don't remember whether he did or not.

(Testimony of Samson N. Peneku.)

Q. You didn't say, "Pleased to meet you," or anything of that kind? A. No, sir.

Q. As a matter of fact, you were not pleased to meet him? A. I didn't say so.

Q. He didn't say, "Pleased to meet you"?

A. No, sir. [24]

Q. He didn't say anything at all?

A. No, sir.

Q. After that you didn't see Kong until he was seated at the table?

A. Well, the door was right near the table. He just came in and sat down right there. It is not any more than four feet.

Q. After you wife's niece introduced you and said, "This is Steve Kong," you didn't see him until he was seated at the table with the other people? A. Yes.

Q. That is correct? A. Yes.

Q. How long after your wife's niece presented Mr. Kong was it that you saw him seated at the table? A. I don't know how long.

Q. About how long?

Mr. Richardson: He says he doesn't know. I don't see why it is relevant enough to go over it and over it and take the time.

The Court: He may answer.

Q. (By Mr. Soares): Can you give us an idea about how long after?

A. A matter of a very short time.

Q. How come you saw him at that time? [25]

A. Because he was sitting down on the chair.

(Testimony of Samson N. Peneku.)

Because I was facing straight to the way he was sitting down.

Q. Did you put down the magazine?

A. No, sir.

Q. How were you able to see him?

A. I had my magazine up in the air, because it is a clear deal around.

Q. You took eyes off the magazine and looked over the edge of the magazine and saw Mr. Kong at the table?

A. Yes, sir.

Q. Nothing occurred there to attract your attention to him, did it?

A. No, sir.

Q. Up until the time that Mr. Kong came over and talked to you, had anybody in that room said anything other than when Mrs. Gohier introduced Mr. Kong?

A. In what room? In the kitchen?

Q. In the kitchen, yes.

A. All of my family was there in the kitchen.

Q. Did anybody say anything?

A. Not that I know of. I don't remember.

Q. Is it that you don't remember or if they did say something you didn't hear it?

A. No.

Q. Which is it? [26]

A. I didn't hear it.

Q. Then the very next thing you heard after your wife's niece introduced Mr. Kong was when Mr. Kong came up to you and spoke to you?

A. Yes, sir.

Q. And what was it that Mr. Kong said to you then?

A. That he wanted to see me.

Q. What did he say?



(Testimony of Samson N. Peneku.)

A. "You, I want to see you."

Q. Just like that? A. What is it?

Q. Just like that? A. Yes.

Q. What was his tone of voice?

A. Well, it was pretty high.

Q. Was it friendly or rough?

A. Well, it was not too friendly.

Q. Was it at all friendly or rough?

A. It was friendly.

Q. What didn't you like in his tone?

A. Well, his voice was pretty high.

Q. Well, you talked to him afterwards?

A. I didn't say anything. I looked at him for a long time.

Q. After that, after he said that you went in the room and you and he had a talk? [27]

A. Yes, sir.

Q. Was it the same tone of voice in the room?

A. Yes.

Q. Could you tell whether he was angry at you?

A. I don't know.

Q. When he came up and said, "You——"

A. I don't know.

The Court: Just a minute. Wait until the question is finished before you try to answer it.

Q. (By Mr. Soares): And do you remember that distinctly what he said was, "You, I want to see you"? A. Yes, sir.

Q. You pointed your finger when you were repeating the words that you say he said. Did he point his finger the same way you indicated when you said, "You, I want to see you"? A. Yes.

(Testimony of Samson N. Peneku.)

Q. You were still looking down and reading your magazine?  
A. Yes, sir.

Q. After Mr. Kong said, "You, I want to see you," who next spoke?

A. I don't know who spoke next.

Q. Who do you recall as speaking next after he said that?

Mr. Richardson: He says he doesn't know. I object to it. It is just the same question. It is repetitious.

Mr. Soares: I don't see that it is [28] repetitious.

The Court: I know, but if he doesn't know who, he can't recall.

Mr. Soares: I didn't ask him to recall who next talked. I asked him whom he recalled next talked, not who actually talked.

The Court: The objection is sustained.

The Witness: I don't know.

The Court: There is no question for you to answer.

Mr. Soares: Did the Court sustain the objection?

The Court: Yes.

Q. (By Mr. Soares): After Mr. Kong pointed his finger at you and said, "You, I want to see you," what was the first thing you said?

A. I never said anything.

Q. All the rest of that night?

A. Yes, sir—no, not at that moment.

Q. I am not asking about that moment, I am asking about the first thing you said after that.

(Testimony of Samson N. Peneku.)

A. I never said nothing. I stood up and walked with him.

Q. Well, didn't you say anything anymore?

A. No, I never said anything.

Q. You mean you didn't speak a word?

A. No, sir, not until we got into the room.

Q. Well, at any time, whether it was in the room or at any time, did you speak to him in the [29] room? A. Yes.

Q. What was the first thing you said to him in the room?

A. I didn't say it first. He said it first.

Q. What was the first thing you said?

A. I said, "No, no, no."

Q. And what did he say to you, if anything, after you said, "No, no, no"?

Mr. Richardson: I object to this as an attempt to confuse the witness.

The Court: Overruled. Do you understand the question?

The Witness: Yes, sir.

The Court: All right, you may answer it.

The Witness: Well, he asked me to, "I want you to vote not guilty on the Smith Act."

Q. (By Mr. Soares): That was before you said, "No, no, no?" A. Yes, sir.

Q. I am asking you what, if anything, did Kong say after you told him, "No, no, no."

A. No, sir, he didn't say nothing.

Q. Nothing more? A. No, sir.

Q. And when you said, "No, no, no," did you walk out or did Kong go out first?

(Testimony of Samson N. Peneku.)

A. I opened the door and let him go out [30] first.

Q. Now, after Kong said to you, "You, I want to see you," what was the next thing you remember Kong said to you?      A. I don't remember.

Q. Do you remember him saying anything to you after that?

The Court: Mr. Soares, I am going to ask you to identify the room in the house you are talking about in your question. It is quite obvious to me——

Mr. Soares: I am cross-examining.

The Court: I am insisting that you identify the room.

Mr. Soares: This is cross-examination.

The Court: I understand, but please conform to the Court's ruling. Identify the room that you are referring to in your question.

Mr. Soares: But I am not referring to any particular room.

The Court: Mr. Soares, I thought I made my position clear on the record. There is nothing further for you to say.

Mr. Soares: I have no room in mind. I have no knowledge in what room that Kong next spoke, so I cannot identify the room.

The Court: You are cross-examining him on the basis of this man's direct examination. You have the kitchen and bedroom in mind. You are asking him about this conversation. If you are referring to a room, identify it. If you are not, [31] make that clear also. Proceed.

(Testimony of Samson N. Peneku.)

Mr. Soares: I am not referring to a room.

The Court: I don't want any more talking.

Mr. Soares: I am addressing the witness.

The Court: Proceed.

Q. (By Mr. Soares): Without referring to what room or where it may have been, what was it that Kong said to you first as near as you can recall after he said to you in the kitchen, "You, I want to see you"?

A. I don't recall what he said.

Q. What is the first thing that you can recall that he said after he said, "You, I want to see you"?

A. I never said nothing.

Q. Regardless of where he may have been when he said——

A. I never said nothing.

Q. Not what you said, what Kong said. What is the first thing that Kong said that you can remember?

A. That is what he said, "I want to see you."

Q. Now after that what did he say whether in the kitchen, in your father-in-law's room or out in the yard or wherever it may have been?

A. Well, in my father-in-law's room that is what he said, "I want you to vote not guilty."

Q. As soon as you got inside the room, he said that?

A. Yes. [32]

Q. When he said, "I want you to vote not guilty," did you say anything?

A. Yes, sir. I said, "no, no, no."

Q. And after you said "no, no, no," did he say anything more?

(Testimony of Samson N. Peneku.)

A. He didn't say nothing. I opened the door right up.

Q. Did you say anything more to him after you said "no, no, no"?

A. Not until we left the room.

Q. And when you left the room, what did you say to him?

A. We went to the kitchen and then there I told him he better pack his goods and get out.

Q. And did he get out?           A. Yes, sir.

Q. Did he pack any goods with him?

A. Yes, he took all his beers with him.

Q. Do you mean all that was left?

A. Yes, I don't know how much was left in the package.

Q. Did anybody go with him?

A. Mrs. Gohier.

Q. Nobody else?           A. Nobody else.

Q. When was it that he said something about Harriet being a great friend of his? When was it he first mentioned Harriet's name? [33]

A. When we was in the room.

Q. In what connection did he mention her name?

A. I don't in what connection, but he said Harriet was a good friend of his.

Q. When did he say it in the room, when in reference to other things that he said?

A. Well, it happened when he asked me to vote not guilty.

Q. At the same time? Before you said anything?

A. Yes, sir.

(Testimony of Samson N. Peneku.)

Q. Will you tell us all he said before you said "no, no, no," in that room, your father-in-law's room.

A. Well, when we got in there—he opened the door, stepped inside and as he closed the door, and he asked me, "I want to do one favor."

And I told him, "What is it?"

And he said, "Vote not guilty."

And I said, "No, no, no."

And then at that time he said that Harriet was a good friend of his and then he paused for a little while.

Q. Then he what?

A. Paused for a little while and he said he can't give me anything because he is broke and he had no money.

Q. When did he say that?

A. Right in the room. [34]

Q. Now, why didn't you say that in answer to Mr. Richardson's questions? A. Well, I——

Mr. Richardson: I object to the question, if your Honor please.

The Court: The objection is overruled.

Q. (By Mr. Soares): Can you answer the question?

A. Well, I didn't quite understand what he said.

Mr. Soares: Will you read the question, please?

(The question was read.)

Q. (By Mr. Soares): That refers to what you just said about him being broke and couldn't give you anything.

(Testimony of Samson N. Peneku.)

The Court: Do you understand the question?

The Witness: I didn't quite understand Mr. Richardson's question at that time.

Q. (By Mr. Soares): You say you are working as a welder for Honolulu Gas Company?

A. Yes.

Q. And were you working as a welder at the time you were drawn on the jury?

A. Yes, I was still working.

Q. How long had you been working?

A. Twelve years now.

Q. What was your rate of pay?

Mr. Richardson: I object to this as being [35] immaterial.

Mr. Soares: I would like to point out to the Court why I think it is material.

The Court: If you are speaking to the Court, stand up.

Mr. Soares: I didn't want to state it in the presence of the jury.

#### Colloquy at Bench

Mr. Soares: Although I have no witness to corroborate it, it is my information that this man made a statement that he was glad to get off of the jury because he would lose too much money from his pay if he remained on the jury. That is what I was leading up to.

The Court: You may proceed.

(Colloquy at the bench ended.)

Mr. Soares: I take it the question is allowed.

The Court: Read the question please.



(Testimony of Samson N. Peneku.)

(The question was read as follows:)

“Q. What was your rate of pay?”

Q. (By Mr. Soares): I mean as a welder for the gas company at the time you were selected as a juror?

A. I was getting \$1.87 an hour.

Q. Did you have any overtime?

A. No overtime.

Q. Did you work forty hours a week?

A. Forty hours a week. [36]

Q. No overtime?

A. The only overtime we have is in case of an emergency.

Q. Was there any overtime work going on at that time?

A. No.

Q. Did you say \$1.80 per hour?

A. \$1.87 per hour.

Q. Did you know what your rate of pay as a juror was going to be?

A. Yes, sir.

Q. How much?

A. \$7.00 a day.

Q. As a matter of fact, Mr. Peneku, you are quite happy to get off of the jury because you would have lost money if you stayed on the jury?

A. I would not have lost money because the company pays me the difference.

Q. They paid you whether you worked or not?

A. Yes, sir, they pay the difference between what I get paid by the government and my salary.

Q. They pay the difference?

A. Yes, sir.

Mr. Soares: No further questions.

The Court: Any redirect examination?

Mr. Richardson: No other questions.

The Court: You are excused. [37]

(Witness excused.)

The Court: Before calling the next witness, it being five minutes of the hour we will take our recess at this time. The jury is to be aware of my instructions not to discuss this case.

(A recess was taken at 10:55 a.m.)

After Recess

The Court: Note the presence of the jury and the defendant, together with counsel.

Please call your next witness, Mr. Richardson.

Mr. Richardson: I call Mrs. Peneku.

EMMA H. PENEKU

a witness called by and on behalf of the plaintiff, having been duly sworn, testified as follows:

The Court: Please state your name.

The Witness: Emma H. Peneku.

The Court: Are you over 21?

The Witness: Yes, sir.

The Court: Where do you live?

The Witness: I live at 1128 Gulick Avenue.

The Court: You are the wife of the man who first testified in this case?

The Witness: Yes, sir.

The Court: Are you a citizen of the United States?

The Witness: Yes, sir. [38]

The Court: Only?

(Testimony of Emma H. Peneku.)

The Witness: Yes, sir.

The Court: Speak good and loud so everyone can hear you.

Direct Examination

By Mr. Richardson:

Q. Mrs. Peneku, you are the wife of Mr. Peneku who just testified? A. Yes, sir.

Q. Do you know the defendant in this case, Stephen Kong? A. I know him now.

Q. Do you see him in the court room?

A. Yes, sir. He is right there next to Mr. Soares.

Q. Has he been to your house?

A. Yes, he has.

Q. I will ask you specifically on November 8, 1952, which was a Saturday, did he come to your house that day? A. Yes, he did.

Q. And Mrs. Peneku, had he been to your house before that day?

A. Well, probably but I didn't see him. I mean—no—I mean I didn't see meet for sure until the day he came to my house. I am not sure that he visited before. I am not sure. [39]

Q. Do you recall if you saw him before that day?

A. No, not before the morning of the 8th.

Q. The morning of the 8th? A. Yes.

Q. Did you know Stephen Kong before that time? A. Yes.

Q. Had you met him? A. Yes.

Q. Back to November 8th, Saturday, when did he first come to your house that day?

(Testimony of Emma H. Peneku.)

A. Saturday morning.

Q. Who was with him, if anyone?

A. He came alone.

Q. He came alone?           A. Yes, sir.

Q. Is Minnie Gohier your niece?

A. Yes, sir.

Q. Was she there at that time?

A. Yes, sir.

Q. At the time he came on Saturday morning?

A. Yes.

Q. What did they do there at that time, if you remember?

A. Well, I understand he came to eat breakfast.

Q. Did he eat breakfast? [40]

A. Yes, sir.

Q. How long did he stay on that morning, if you know?           A. For a few minutes.

Q. Did he come back later on in the same day?

A. Yes, sir.

Q. Do you know about what time that was?

A. Between 7:30 and 8:00.

Q. Was anyone with him?

A. Yes, my niece.

Q. Is that Mrs. Gohier?           A. Yes.

Q. Mrs. Peneku, do you know if Mrs. Gohier and the defendant, Mr. Kong, recently got married?

A. They were married two days ago.

Q. Now, Mrs. Peneku, on the night of November 8th, when he and Mrs. Gohier came there, who else was in the house?

A. Well, there was grandpa and the children, her children and my grandson. I think they were the only ones.

(Testimony of Emma H. Peneku.)

Q. You say her children. Do you mean Mrs. Gohier's children?      A. Yes.

Q. How many children were there?

A. Three.

Q. And they were all hers?      A. Yes. [41]

Q. And they were all there in the house?

A. Yes.

Q. Now, was Mr. Peneku there?

A. Yes, he was.

Q. Mrs. Peneku, what was Mr. Peneku doing when Mr. Kong came, if you know?

A. I don't know—he was lying down in the kitchen. You see our kitchen and dining room is one big room and on the side there is a little punee and he was lying there in his pajamas.

Q. Was he reading?

A. Reading a Life magazine, looking at the pictures.

Q. Did Mr. Kong and Mrs. Gohier bring anything with them?      A. Yes, sir.

Q. What did they bring?

A. They brought along some beer.

Q. Do you know how much beer?

A. No, I don't know. It was a big package.

Q. Do you know who drank the beer?

A. I think grandpa had a can.

Mr. Soares: I didn't hear the answer.

(The answer was read.)

Q. (By Mr. Richardson): Did anybody else have a can, if you know? [42]

A. Minnie, my niece, and Mr. Kong were drinking it.

(Testimony of Emma H. Peneku.)

Q. Minnie is your niece? A. Yes, sir.

Q. Did you and Mr. Peneku drink anything?

A. No.

The Court: Just a minute. You will have to speak louder and more distinctly.

Q. (By Mr. Richardson): You stated, Mrs. Peneku, that Mr. Peneku was lying on the punee?

A. Yes, sir.

Q. What were the rest of you doing, you and grandpa, and Mr. Kong and Mrs. Gohier?

A. Well, I just wasn't sitting down when they came in. I was rushing around doing my work. As soon after they came in I imagine they were introduced, but Sam is the type that doesn't acknowledge an introduction.

Mr. Richardson: I wonder if you would speak a little and a little clearer.

The Witness: They came in. I knew they were coming before they got there. I knew he was coming before he came there. He called and talked to Clayton, Minnie's oldest boy.

Q. (By Mr. Richardson): When you say he came, whom do you mean? A. Mr. Kong.

Q. When they got there, what did you do, sit at a table? [43] A. Not right away.

Q. Just tell us what happened.

A. Well, I imagine Sam just didn't respond to the introduction. I wasn't there at the time he was introduced, but I imagine Sam just didn't respond to the introduction.

Mr. Soares: May I have the answer read?

(Testimony of Emma H. Peneku.)

(The answer was read.)

Q. (By Mr. Richardson): By Sam, do you mean your husband?      A. Yes, sir.

Q. Do you and the rest sit around the table?

A. There wasn't anybody talking. I came in and sat down and talked. My husband wasn't paying any attention to us.

Q. He was on the punee?      A. Yes.

Q. Now, do you and the rest of them there, including Mr. Kong, have a conversation, were you talking?      A. Yes, we were talking.

Q. Do you recall what you were talking about?

A. Everything from Ford cars to pheasant leis.

Mr. Soares: May I have the answer read?

(The answer was read.)

Q. (By Mr. Richardson): Was Mr. Kong in the conversation, was he talking with the rest of them? [44]      A. Yes, sir.

Q. Did he mention any names of any persons?

Mr. Soares: Objected to as leading and suggestive.

The Court: The objection is sustained. Ask her what was said.

Q. (By Mr. Richardson): What was said, Mrs. Peneku, in the conversation there?

A. Nothing in particular. We talked about pheasant leis. Grandpa makes them, so we discussed that, and he said he was going to Maui to paint a house.

Q. Who said that?      A. Mr. Kong.

(Testimony of Emma H. Peneku.)

Q. What else did he say?

A. He said—I have forgotten about how it started.

Q. What other things did you talk about, if anything?

A. He said he was going to paint his mother's house; that his mother had a case coming up and he said he was going to get Harriet to work on it. He said Bouslog, you know, the wahine attorney.

Q. Will you repeat that, please.

A. He is going to Maui to paint his mother's house. He said, "My mother has a case coming up," and he said he was going to have Harriet work on it.

So I said, "Who?"

And he said, "Bouslog, the wahine attorney. She is a [45] a damned good attorney."

Q. He said what?

A. He said she was a damned good attorney.

Q. Mrs. Peneku, do you recall if anything else was said in the conversation?      A. Well, no.

Q. Did you talk about anything else?

A. I guess then he stood up and wanted to get Sam off to talk privately.

Q. What did he say?

A. He said, "You come. I want to talk to you."

Q. To whom?      A. To Sam, my husband.

Q. What happened then?

A. Well, he didn't just get right up, and he walked over and I think he grabbed Sam by the hand.

Mr. Soares: May I have what she first said in



(Testimony of Emma H. Peneku.)

this answer. I have the last part of the answer, but there were some words preceding that which I did not hear.

The Court: Yes. But if you want an answer read, wait until it is finished. Don't interrupt it just because you don't happen to hear something at the beginning. We will gladly reread it for you.

(The answer was read.)

Mr. Soares: I move that that portion of the answer [46] "I think he grabbed Sam by the hand," be stricken, if the Court please.

The Court: What do you mean by the word "think"? Do you know whether he did or not?

The Witness: He did.

Q. (By Mr. Richardson): Did he say anything?

A. Not roughly. He just grabbed his hand.

The Court: Wait a minute. You will have to speak out so we can hear every word.

The Witness: It wasn't a rough pick up or anything, just like two friends might walk off. I am sorry, but I can't talk any louder.

Mr. Richardson: Do the best you can.

Q. (By Mr. Richardson): Now, Mrs. Peneku, didn't you say a minute ago he said he wanted to talk to Sam? A. Privately.

Q. Did he say that to you or who?

A. He said that to Sam. And I said, "Why?"

Q. Who said that?

A. I did. And he said, "on some family affair." And then they walked off.

(Testimony of Emma H. Peneku.)

Q. Where did they go?

A. In through a little hall, through the parlor to grandpa's room.

Q. Just the two of them? [47]

A. Yes, sir.

Q. Did they later come back in the dining room and kitchen together?

A. They did, and Steve and Minnie pulled a fast exit and Sam came out so mad.

Q. You could tell that? A. Oh, yes.

Q. And then you say Mrs. Gohier and Mr. Kong left immediately?

A. They walked right out and I said, "Wait, take your beer."

Q. Did they take it? A. Yes, sir.

Q. Mrs. Peneku, at the time you were sitting there, at the time of the other conversation you told us about, about going to Maui to paint his mother's house, did he say anything else about going to Maui?

A. That was all, that was his reason for him going to Maui.

Q. Was there any other discussion on any other subject?

A. Oh, that I wanted to be on the jury.

Q. What was said about that?

A. That I am ashamed of. I said, "Now that they are picking women for the jury, I wish some day they would pick me." [48]

Q. Did you say why?

Mr. Soares: May I have the question read, please?

(Testimony of Emma H. Peneku.)

(The question was read.)

Q. (By Mr. Richardson): I think you said you would like to be on the jury? A. Yes.

Q. Did you give any reason for that?

A. I said I would make everyone guilty.

Mr. Soares: What is that?

Q. (By Mr. Richardson): What did Mr. Kong say to that, if anything?

A. He said, "You mean to say you would make my mother guilty?"

I said, "Oh, no, Steve. At the moment I didn't think about your mother."

Q. Mrs. Peneku, can you estimate how long Mr. Kong and your husband were out of the room before they came back? Do you know what length of time it was?

A. It wasn't so long, about five minutes, maybe.

Q. About five minutes or so? A. Yes.

Mr. Richardson: I believe that is all.

The Court: Before we begin cross-examination, Mrs. Peneku, it isn't that you don't speak loudly enough, [49] but you drop your voice. Don't drop your voice until you come to the end of your statement. Keep your voice up so we can hear every word that you say.

All right, you may cross-examine.

### Cross-Examination

By Mr. Soares:

Q. Can you recall when it was that you first saw Mr. Kong in your life?

(Testimony of Emma H. Peneku.)

A. About two or three months before this incident.

Q. Was Minnie with him at that time?

A. Yes, sir.

Q. And where was it?

A. At her home in Kahaluu.

Q. Can you recall when it was that you first saw Mr. Kong in your home on Gulick Avenue?

A. Saturday morning, November 8.

Q. The Saturday in question? A. Yes.

Q. Were you working at that time?

A. Yes, sir.

Q. Where were you working?

A. For the Hawaiian Pineapple Company.

Q. And is that seasonal employment, or are you steady? A. I am a steady employee.

Q. What were your working hours at that [50] time? A. 7:30 to 3:30.

Q. I beg your pardon?

A. 7:00 to 3:30, five days a week.

Q. That is, you have Saturdays and Sundays off?

A. At that time, yes, sir. Now we are working Saturdays.

Q. I am talking about that time. A. Yes.

Q. Minnie was in the habit of bringing her children from the other side of the island and leaving them at your home? A. Yes, sir.

Q. And Kong was also in the habit of coming and picking her up and taking her back to the other side of the island from your home, was he not?

A. That I do not know.

(Testimony of Emma H. Peneku.)

Q. You never heard of that?           A. No.

Q. I understand you never had seen him at your home?

A. Not before Saturday the 8th of November.

Q. Did you ever discuss Stephen Kong with your husband, with particular relation to his interest in Minnie?

A. With my husband?

Q. Yes.           A. No, sir. [51]

Q. Then you discussed him with Minnie?

A. Yes.

Q. Did you or did you not have a breakfast with them that morning at your home?

A. I did not have breakfast with them.

Q. You saw him come in, did you? You saw Stephen Kong come in there that morning?

A. I came up from the washroom and he was in my kitchen.

Q. And what took place between you and him on that occasion?

A. Nothing at all. I just said "Hello."

Q. You said "Hello?"           A. Yes.

Q. And did he greet you, too?

A. Yes, sir.

Q. Was everything pleasant?           A. Yes.

Q. And you returned home at what time?

A. I was home.

Q. You were there all day?           A. Yes, sir.

Q. What time did Stephen leave that morning?

A. Within about a half-hour.

Q. Were you and he and Minnie and the rest of you in [52] the company of each other all that time?

A. No, no, not me.

(Testimony of Emma H. Peneku.)

Q. Did you have any conversation with him during that half hour that he was there that morning?

A. No, as I came from the washroom he was eating breakfast and I wanted him to know he was welcome and I said "Hello," and I walked off to do my washing.

Q. Were you there when he left that morning?

A. No, I didn't see him leave.

Q. Then when did you next see him?

A. That evening.

Q. Where was he when you next saw him that evening?

A. Sitting at the table in our kitchen.

Q. Who else were at the table, if anyone?

A. There was Mrs. Gohier and grandpa, my father.

Q. And who?

A. My father, my step-father, Mr. Maioho.

Q. Anybody else at the table right at that time?

A. No.

Q. Was your daughter-in-law around there?

A. No, she had gone out and come in.

Q. Was she ever seated at the table?

A. Just for a little bit.

Q. Did she have some of the beer?

A. I think she did. [53]

Q. Now, did you say something about you wished you were on the jury in the Smith Act case?

A. No, I didn't want to go on the jury of the Smith Act case.

(Testimony of Emma H. Peneku.)

Q. Just what did you say about wishing you were on the jury?

A. Speaking of juries—they had in the paper where they were going to let women be jurors. I really didn't mean it, but I did say that I wished I was on the jury some day.

Q. I am sorry, I didn't understand you. You did say what?

A. That I wished I would get on the jury some-time.

Q. Are you sure you didn't mention the Smith Act case?     A. Oh, indeed not.

Q. And what was it you said about convicting everybody?

A. That is what I am ashamed of. I did say I would make everyone guilty.

Q. You would find everyone guilty?

A. Yes.

Q. The Smith Act case had not been mentioned at all?     A. No.

Q. When was it that Kong said he wanted to speak to your husband?

A. The night of November 8.

Q. Well, was that before or after you said you wished [54] you could be on the jury?

A. That was after.

Q. After that?     A. Yes.

Q. Had something else been said in between?

A. Yes.

Q. Do you recall what it was?

A. No. He got mad because I said——

(Testimony of Emma H. Peneku.)

Q. What?

A. When I said I wished I would get to be on the jury, that I would make everyone guilty, he said, "Do you mean to say you would make my mother guilty?"

I said, "Steve, I didn't mean it that way. I wasn't even thinking of her at the moment."

Q. Was it after that that Kong said he wanted to speak to your husband?

A. Not immediately afterwards. Then we went on talking about his going home to paint the house.

Q. After you explained to him that you didn't mean what you were saying about convicting everybody, he said something about he was going to Maui to paint the house?

A. Yes. He said, "I am going to go to Maui to do some little paint job on my mother's house."

Q. From there on was everything pleasant?

A. Yes. [55]

Q. After he said, "I am going to Maui to do a little paint job on my mother's house," do you remember what you said, if anything?

A. I probably said, "When?"

And he must have told me, but I forgot.

Q. He didn't indicate that he had already gone to Maui? A. No, he was going.

Q. Going later? A. Yes.

Q. Then after a little more he said something about "I want to talk to Peneku?"

A. I know what—there came a telephone call that the baby was awake, she said "Come on, Steve, let's go."



(Testimony of Emma H. Peneku.)

Then he went to Sam, "You, I want to talk to you."

Q. That is, a telephone call came? A. Yes.

Q. And who answered the phone?

A. Minnie.

Q. And what was said?

A. That the baby was awake; they had to go home.

Q. Where did the phone call come from?

A. From Lillian Gohier's house on Beckley Street.

Q. Who was talking over the phone?

A. Somebody from that house called to my house and she [56] answered the phone. Then she said, "Come on, we will go. The baby is awake."

And he said, "Wait, wait."

Q. Do you know what baby she was referring to?

A. Her baby.

Q. Where was her baby?

A. With her sister-in-law.

Q. At some other house than yours?

A. Yes.

Q. It was not until they were ready to go that Steve said he wanted to talk to Mr. Peneku?

A. Yes.

Q. And up until that point, except for this little passage, everything was pleasant? A. Yes.

Q. And as soon as Steve said, "Wait, wait, I want to talk to Peneku," you jumped right in and said, "What for?"

(Testimony of Emma H. Peneku.)

A. Yes, because I felt if he had anything to tell my husband, why didn't he tell it right there. I was there. I wanted to listen.

Q. You used the same tone of voice that you used on direct examination when you said, "What for?" You were a little bit worried over it?

A. Yes.

Q. And what did he reply when you asked [57] him?

A. He said, "I am just going to talk family trouble."

Mr. Soares: No further questions.

The Court: Any redirect examination?

### Redirect Examination

By Mr. Richardson:

Q. You mentioned some beer there and the people drinking the beer. Did anybody in the place at all appear to be drunk?

A. Oh, no, nobody was drunk.

Q. Was Mr. Kong drunk? A. No.

Q. Did he appear to be under the influence of alcohol at all? A. No, no.

Q. Did anybody else seem to be? A. No.

Mr. Richardson: I believe that is all.

Mr. Soares: Nothing further.

The Court: You are excused. Next witness.

(Witness excused.)

Mr. Richardson: If your Honor please, may we approach the bench just a second?

The Court: Yes.

(Colloquy at Bench.)

Mr. Richardson: You indicated in response to my request to be permitted to ask the jury about Bouslog and [58] Symonds that you would not let me go into the fact that they did represent his mother. I want to make an offer of proof that they did represent his mother for the reason it shows motive and corroboration of the testimony of these witnesses.

I have the clerk here from Maui. I didn't want to put him on since your Honor indicated this morning you would not let me go into it, but I want to re-apply for it and I would like to make an offer to show by the clerk that Bouslog and Symonds did represent Louise Kong, the defendant's mother.

Mr. Soares: Will you show further that it was Harriet Bouslog—

The Court: Just a moment. The record shows it was Jim King.

Mr. Soares: Here is what happened: Bouslog and Symonds represented this Mrs. King who had murdered her husband. They filed a motion to have her examined mentally, which James King prevented and which motion was granted, as a result of which she was sent to the asylum and the case dropped.

How do those facts prove any issue in this case. Those are all the facts. I don't have the dates that is only thing I don't have.

Mr. Richardson: I have the clerk here and he

has the motion. The motion was filed by Bouslog and Symonds.

The Court: I am not interested in the Maui case, [59] as such. The only thing I would be interested in would be that there was a case in which this defendant was interested, in which the party defendant was represented by Bouslog and Symonds.

Mr. Richardson: I would have to show it is his mother's case.

The Court: Yes.

Mr. Richardson: I would not go into the facts of the case.

The Court: You already have that in evidence.

Mr. Richardson: Yes. I have the clerk here, too, with actual records showing that Bouslog and Symonds did appear.

Mr. Soares: We maintain that supposing they did represent her, how is that material to the evidence?

The Court: Only that it might be relevant as to motive. That is what he is offering it for.

Mr. Soares: How could there be a motive?

Mr. Richardson: The jury should be entitled to draw an inference, if one can be drawn.

Mr. Soares: They have to draw their inferences——

The Court: I think standing alone it is rather doubtful and dubious. If you have some evidence to show that some member of that firm asked him to do that——

Mr. Richardson: Oh, no. [60]

The Court: I think it is too dangerous.

Mr. Richardson: Even on the ground showing the motive?

The Court: If he takes the stand, I will let you ask him.

Mr. Richardson: Let me ask Kong?

The Court: Yes. The most you could get in would be there was a case in which his mother was interested, in which his mother was represented by this law firm, and you have that in evidence twice. You have it once indirectly by Mrs. Peneku and by inference in the testimony of Mr. Peneku.

Mr. Richardson: This would be just corroborating.

The Court: It isn't of sufficient importance to allow it.

Mr. Richardson: All right.

(Colloquy ended at bench.)

Mr. Richardson: Will you excuse me one second?

The Court: Yes.

(Counsel confer.)

Mr. Richardson: That is the government's case.

Mr. Soares: I am taken by surprise at the rapidity of the government's case and ask the Court that we take our midday recess now and return at some hour after lunch.

The Court: No, I think you had better go [61] ahead now. You were told at the time I asked about the time factor that this case might be concluded in one day. We will proceed.

Mr. Soares: Then may I have a moment to consult with my client?

The Court: We will take a short recess for that purpose. Do I understand clearly that you are not making an opening statement?

Mr. Soares: That is correct.

(Mr. Soares and the defendant step out of the court room, after which the jury leaves the court room.)

Mr. Soares (Returning to the court room): I did not mean to transgress the Court's rules.

The Court: I can understand that might happen but I want you to agree that nothing happened in the filing out of the jury after you stepped outside the door with your client.

Mr. Soares: Very definitely not. I had my back turned. I stepped off a few feet. I had turned around and saw that the jury was leaving and it occurred to me that I had left the court room in a violation of the rule. I started right back in and nothing was said by anyone or done by anyone.

The Court: All right. We will take a five minute recess.

(A recess was taken at 11:38 a.m.) [62]

#### After Recess

The Court: Note the presence of the jury and of the defendant together with counsel.

Mr. Soares: Would the Court pardon me just a moment?

The Court: Yes.

Mr. Soares: Will Stephen Kong take the stand?

STEPHEN KONG, JR.

the defendant in this case, having been duly sworn, testified as follows:

The Court: Please state your name.

The Witness: Stephen Kong, Jr.

The Court: Speak good and loud and distinctly.

How old are you?

The Witness: Thirty-two.

The Court: Where do you live?

The Witness: Kaneohe.

The Court: And where in Kaneohe?

The Witness: In the city, Kahaluu.

The Court: What is your occupation?

The Witness: Fire-fighter.

The Court: Employed by whom?

The Witness: City and County.

The Court: Are you a citizen of the United States of America [63]

The Witness: Yes, I believe so.

The Court: Only?

The Witness: Yes, sir.

The Court: Take the witness.

Direct Examination

By Mr. Soares:

Q. Mr. Kong, how long have you been employed as a fire fighter for the City and County?

A. Going to three years.

Q. Did you say going to three years?

A. That is right.

Q. Before that where were you employed?

(Testimony of **Stephen Kong, Jr.**)

A. As a fire fighter for Hickam Field.

Q. Where did you attend school?

A. St. Anthony's in Wailuku, Maui.

Q. Did you go to high school? A. Yes.

Q. Did you complete high school? A. Yes.

Q. Did you attend any other school after that?

A. No, sir.

Q. You are the defendant in this case?

A. Yes, I am.

Q. Were you at the home of Mr. and Mrs. Peneku on Gulick on Saturday, November 8, last year? [64]

A. Yes, sir.

Q. How many times were you there that day?

A. Twice.

Q. When was the first time?

A. After I got through working in the morning at 8:00 o'clock and I went over there to change clothes, dressing clothes that Minnie brought up the previous evening.

Q. Is Minnie Mrs. Gohier, the niece of Mrs. Peneku? Is that the Minnie you mean?

A. That is right.

Q. Can you give us some idea about the time you arrived at the Peneku home?

A. About 8:30 in the morning.

Q. When you got there, with whom did you speak?

A. With Mr. Maioho, which is Mrs. Peneku's step-father. That is Minnie's step-father by adoption, too. He was there, Minnie was there and Mrs. Peneku came in the house when I got there.



(Testimony of Stephen Kong, Jr.)

Q. How long did you remain there on that occasion? A. Oh, 45 minutes, I believe.

Q. And from there where did you go?

A. Then me and Minnie left and went about the business we had planned to do that day.

Q. Went where?

A. In town to do some shopping. [65]

Q. Was Mrs. Peneku there all the time you were there that morning? A. Yes, she was there.

Q. The whole 45 minutes?

A. She was doing her laundry and she has to go in and out of the house. She was conversing and also pitching in the conversation that me and her step-father were talking about. We were talking about his pheasant leis and the things he was doing around the house and that is all.

Q. Had you ever been at that home before that day?

A. Not in the home. I had been there about four or five times to pick up the children or either bring them and leave them there.

Q. Will you explain what you mean when you say you were not in the home, but you left the children there and picked them up four or five times?

A. Well, I drive up or catch a taxi and leave the children off at the gateway and say goodbye and then I run along.

Q. That is, you did not go into the home?

A. No, not in the home.

Q. Is that the first time you had been inside the home that morning?

(Testimony of Stephen Kong, Jr.)

A. No, I had been in there once when her father was home and neither of them two were home. [66]

Q. Neither Mr. or Mrs. Peneku?

A. No, they weren't there at the time when I was there, but I had been in the home.

Q. About the yard or around the front of it had you ever seen Mr. Peneku around there on any of those occasions?

A. I have seen about three times that I have been there.

Q. Did he say anything to you or you to him?

A. I nodded or spoke to him, but there is no response.

Q. What time did you return to that home?

A. It was rather late in the evening. I can't recall the time exactly. I would say around 6:00, somewhere around there.

Q. Well, was it still daylight?

A. Just about dark.

Q. And who came with you when you returned that evening, if anyone?

A. Me and Minnie, and we stopped in the grocery store there and then she said, "Well, I think I will call up grandpa and ask him if he wants some beer." And he said he can stand one or two so I went ahead and got a half dozen and we went up there.

Q. And where did you take the beer.

A. I took it into the home of Mr. Peneku and set it on the table and I invited Mr. and Mrs. for a beer.

(Testimony of Stephen Kong, Jr.)

Q. When you got into the home, to what room did you go? [67]           A. In the dining room.

Q. Who, if anyone, went with you?

A. Just Minnie and myself.

Q. Before you got into the dining room, had you seen anybody in the house?

A. Oh, yes. We met grandpa at the door because he was expecting us.

Q. That is Mr. Maioho?           A. Yes.

Q. And did you leave him at the door when you went into the dining room, or did all three of you go in together?

Mr. Richardson: I object to this as leading.

The Court: The objection is sustained.

Q. (By Mr. Soares): After you met Maioho at the door where did you go, where did Minnie go and where did Maioho go?

A. Oh, Maioho sat us at the table and told us to make ourselves comfortable and he would join us shortly, and he did so. He went on ahead and got the opener for the beer and poured himself one and Minnie one and myself one. Later on the daughter-in-law came in the house and I asked her if she cared for a beer. She said she didn't mind and the four of us sat down and drank four beers.

Q. Did you have more than one beer?

A. I had two of them. Two beers I believe I had. [68]

Q. Did that have any effect on you at all, the beer?           A. No.

Q. You can stand two beers?

(Testimony of Stephen Kong, Jr.)

A. I can stand two beers.

Q. Now, when you came into the dining room or kitchen or both——

A. It is a kitchen and dining room. It is just open. There is no partition between the kitchen and dining room.

Q. Did you see Mr. Peneku that evening?

A. Yes, after we got in the home there and grandpa seated us at the table then Minnie said, "Come over I want you to meet my uncle." So she made the introduction and he didn't respond to the introduction and I went ahead and went back and sat down to the table.

Q. Where was he when Minnie told you to come over she wanted you to met her uncle?

A. Some ten feet away from the table where we were sitting. He was against the wall on a punee reading a magazine.

Q. What position was he on the punee, stretched out, sitting down, or what?

A. Making himself comfortable so he could read, on his back, perhaps, or on his side or something like that.

Q. Now, after Minnie attempted to make this introduction, which Peneku did not acknowledge, what did you do? [69]

A. I went back and sat down. Well, you know how any man would feel about introductions. I didn't know and I sat down.

Mr. Richardson: I object to this man's views on the way people feel about introductions. It is not responsive to the question.

(Testimony of Stephen Kong, Jr.)

The Court: That is true, however, the answer may stand as it is his manner of answering.

Q. (By Mr. Soares): Without regard to how any man may feel, how did you feel when Mr. Peneku acted as he did?

A. In my opinion, I liked the Mrs. very well—  
Mr. Richardson: I object to his opinion.

The Court: It may go out. You are correct.

Q. (By Mr. Soares): Just answer the question. How did you feel when Peneku made no response to the introduction?

A. I felt like any other man would feel.

Q. Well, describe your own feelings.

A. It was satisfactory in my opinion. It didn't hurt me a bit, none whatsoever.

Q. It didn't hurt you a bit?                      A. No.

Q. Had you any occasion to see Peneku around there before that?

A. Yes, sir, I had seen him the few times I did pick the children up, or vice versa, or drop them there. If he [70] was in the yard and I approached, I don't know if it was one of his ways, but he walked away. If I nodded to him or said "hello" there was no response.

The Court: We will take our noon recess at this time and we will reconvene at 2:00.

The Clerk: At 1:30 we have a sentence.

The Court: The jurors and the parties are excused until 2:00 o'clock. Court will stand at recess until 1:30.

(A recess was taken at 12:00 o'clock [71] noon.)

(Testimony of Stephen Kong, Jr.)

Afternoon Session—August 14, 1953

(The trial resumed at 2:00 o'clock p.m.)

The Clerk: Criminal No. 10,704, United States of America, plaintiff, vs. Stephen Kong, Jr., defendant, for further trial.

The Court: Note the presence of the defendant together with counsel and also the presence of the jury.

Mr. Defendant, I remind you that you are still under oath and under the necessity of speaking loud and clear. You may continue.

Direct Examination

(Continued)

By Mr. Soares:

Q. After Minnie took you over to introduce you to Mr. Peneku and you got no response, what did you do?

A. I went back and sat on a table where we were sitting.

Q. And who all were at the table when you got back?

A. Mr. Maioho, Minnie, Mrs. Peneku.

Q. Did Mrs. Peneku sit around the table?

A. Yes, and we started conversing about everything else.

Q. Now, later, did you say anything to Mr. Peneku?

A. No, I didn't say anything to Mr. Peneku.

Q. I say, later that day at any time?

(Testimony of Stephen Kong, Jr.)

A. Yes, I did talk to him.

Q. With relation to the time you were ready to leave, to [72] go home, when was it that you talked to Mr. Peneku?

A. Oh, just before we were leaving the place I went over and asked him that I wished to make my introduction more clearly and I want to speak to him about Minnie and this and that. And I felt that it wasn't nice of me to bring up family argument in behalf of the grandfather and the rest of the guests that were sitting at the table so I asked him if he wouldn't mind to discuss about me and Minnie elsewhere. And he say, well, let's go in the parlor somewhere else.

Q. You heard Mrs. Peneku testify that you went over to Mr. Peneku and said you wanted to talk to him and that she said "What for?" That's correct, isn't it?

A. She said that but not in the tones—she told me was it necessary for me to go elsewhere and talk about the family rather than in front of the grandfather. I say "Yes," because he always wanted us to go up there and he lived there so the only means of us to see him is to go there to Peneku's place.

Q. Now, what took place between you and Mr. Peneku when you got into this other room?

A. Well, I accused him of being impolite to go away from the family, but I told him that I felt that I wanted to bring up about family argument mostly about myself and Minnie.

Q. What did he say in reply to that?

(Testimony of Stephen Kong, Jr.)

A. Oh, he said that he doesn't approve of me going around with Minine. [73]

Q. And was that all the conversation you had with him in that room?

A. Yes, it was all on family affairs.

Q. And how did the conversation end up? How did you leave the room?

A. Well, after I told him that about everything else, he went ahead and told me that in the first place he didn't like me. He said he didn't like me to go along with Minnie. He told me not to come over to the house anymore.

Q. Did you mention Harriet Bouslog in a conversation with Peneku? A. No, I did not.

Q. Did you mention Harriet Bouslog anytime that afternoon? A. Yes, I did.

Q. Or evening, I should say. To whom did you mention Harriet Bouslog?

A. Well, when Mrs. Peneku asked me who my mother's attorney is going to be, so I said that my sister is handling her case and I heard from her that she going to ask Harriet Bouslog to take the case.

Q. What had been said by anyone just prior to Mrs. Peneku asking you who your mother's attorney was going to be? A. I don't quite get you.

Q. What had been said just before Mrs. Peneku asked you that question? [74]

A. Well, she was talking about the seven defendants on the Smith Act.

Q. Who was talking? A. Mrs. Peneku.



(Testimony of Stephen Kong, Jr.)

Q. Who brought up the subject?

A. She brought the subject up.

Q. What did she say in connection with the Smith Act case?

A. She asked the husband what is the news of the day. And so how she just came out and she say—well, I guess the topic of the news nowadays is the Smith Act trial, and she say if she were on the jury she would see to it that everyone would be convicted.

Q. Did anybody reply to that?

A. I did. I told her that it is not nice to say things like that unless there is proof and evidence that each and everyone of us be justified. In other words, not somebody else. That is her opinion. So I in turn said, well, somebody is on trial. I guess if your opinion is like that, I guess I will find my mother guilty, too.

Q. And is that what she asked you, who your mother's attorney was?

A. Yes, when she did ask.

Q. And what did you say to her in response to that?

A. I said I heard my sister saying that she is going to have Harriet Bouslog take the case up. [75]

Q. Had you ever talked to Harriet Bouslog about representing your mother?

A. No, I did not.

Q. Or anybody in that firm about representing your mother?

A. No, I did not.

Q. Did you say to Mr. Peneku, "I want you to do me a favor"?

A. No, I did not.

(Testimony of Stephen Kong, Jr.)

Q. Did you say to Mr. Peneku, "I want you to vote not guilty"? A. No, I did not.

Q. Did you in any way attempt to get Mr. Peneku to vote any particular way in the Smith Act case? A. No, I did not.

Q. Did you have any interest in the outcome of the Smith Act case? A. No.

Q. Did you say to Mr. Peneku that you were broke and couldn't pay him? A. I did not.

Q. Was there any occasion for you to have said that? A. There is no occasion why.

Mr. Soares: You may cross-examine.

#### Cross-Examination

By Mr. Richardson:

Q. Mr. Kong, when did you and Minnie go here and get married? [76]

A. Got married Wednesday night.

Q. This past Wednesday?

A. That's right.

Q. Now, you have been married before, have you not? A. Yes.

Q. And when did you get your divorce?

A. Last month, on the 21st.

Q. You say last March, or last month?

A. Last month.

Q. That would be July? A. Yes.

Q. And do you have any children by your first marriage? A. Yes, I have.

Q. How many? A. I have four.

Q. And where are those children now?

A. Well, three is living with the mother at present and one my future wife is custodian adopted.

(Testimony of Stephen Kong, Jr.)

Q. Well, now, when you say "future wife," you mean Minnie? A. No, I mean——

Q. Your present wife? A. Yes.

Q. Do you support your children?

A. Yes, I do.

Q. Now, does Minnie have any children? [77]

A. Yes, she has.

Q. How many does she have?

A. She's got four.

Q. And who is supporting them?

A. Well, she is living on compensation.

Q. Sir? A. Social security.

Q. Social security? Well, you are also supporting them? A. No.

Q. You are not supporting Minnie's children?

A. No.

Q. You have been going with Minnie for some time, have you not, Mr. Peneku—pardon me, Mr. Kong? A. Yes, I knew her.

Q. Well, you have been going with her for sometime? A. Yes.

Q. About how long?

A. Oh, about a year or so.

Q. About a year or so? As a matter of fact, you have been going with her since about 1950, haven't you?

A. Well, I knew her. I didn't go with her. If that is what you are trying to drive at.

Q. I am just asking how long you have been going with her.

A. Well, I knew her in about '50. [78]

(Testimony of Stephen Kong, Jr.)

Q. Did you go with her at that time?

A. No, I didn't go with her. I went with her after her husband died.

Q. Mr. Kong, was there any particular reason why you and Minnie got married two days before this trial came up?

A. We planned to get married long after her husband died, but my wife didn't give me my divorce until last month.

Q. When did her husband die, if you know?

A. I can't recall the month.

Q. Well, it was at least a year ago, maybe more, wasn't it?

A. Yes, about a year, a little more.

Q. Mr. Kong, do you know Harriet Bouslog?

A. Not personally. But I went to see her. That is way before this trial—I mean before I had been called in on this charge. I went to see her and asked her if she could advise me on affairs that I had with the Civil Service.

Q. How long ago was that?

A. That was in '51, I believe.

Q. When? A. '51.

Q. 1951? Well, is that the only time you ever talked to her?

A. That is the only time I ever talked to her.

Q. Have you ever seen her since then?

A. I seen her around, yes, if that is what you mean, but [79] not to talk to.

Q. You haven't talked to Mrs. Bouslog since 1951?

A. No, that is the only time.

Q. Well, now, I believe you said she was employed to represent your mother in her case?

(Testimony of Stephen Kong, Jr.)

A. I don't know. I heard from the sisted because my mother was in Maui and I am down here working. And my sister is handling her case. So I heard from the sister that she planned to get Harriet Bouslog.

Q. Your sister told you that?

A. Yes, that she is planning to.

Q. Don't you know that in fact she did get the firm of Bouslog and Symonds to represent her?

A. Not at that time. I don't know.

Q. Do you know it now?

A. Yes, Now I know it.

Q. And that is true, isn't it?

A. That is true, yes.

Q. That that firm did represent your mother?

A. Yes, that is true.

Q. Now, Mr. Kong, you say that you had never met Mr. Peneku before this Saturday that you went to the house?

A. You mean to say that I have been introduced to him?

Q. Yes. [80]

A. No, I didn't even been introduced at the time Saturday I went because as he said that he wasn't so eager of meeting me.

Q. I think you said you have seen him two or three times before that?      A. Yes.

Q. And you have said that you would nod to him?      A. Yes, I'd nod to him.

Q. And he wouldn't respond?

A. He wouldn't respond.

Q. But you hadn't been introduced to him before that time?      A. No.

(Testimony of Stephen Kong, Jr.)

Q. Well, on that day, on January 8th, what was the first time that you went to the house—it was November 8th, excuse me. On this Saturday that we are talking about when did you go to the house, Mr. Peneku's house?

A. In the morning, after I got through working, 8:00 o'clock. Somewhere between 8:30 and 9:00 o'clock.

Q. Now, did you know where Minnie was then?

A. Yes, Minnie was up there.

Q. How did you know that?

A. She told me she was going to stay there, she called me.

Q. When did she call you? [81]

A. Called me in the morning and asked me to come up and have breakfast in her place.

Q. She called you before breakfast the same morning? A. Yes.

Q. Where were you when she called you?

A. Working in the station.

Q. That is where she called, you, at the station?

A. Yes.

Q. So you went to the house and there and what time did you get there?

A. Between 8:30 and 9:00 o'clock.

Q. And who was there?

A. The grandfather, Minnie and Mrs. Peneku.

Q. Well, did you eat breakfast there?

A. Yes, I had my breakfast there.

Q. Who ate with you?

A. Me and Minnie and the grandfather.

Q. Just the three of you? A. Yes.

(Testimony of Stephen Kong, Jr.)

Q. How long did you stay there that morning?

A. A little over an hour or so, something in there.

Q. And where did you go when you left?

A. I had some business to do at the time and Minnie brought up some clothes and I changed there and I went along to do my business. [82]

Q. Well, where did you go?

A. I went in town. I don't know where the hell—I mean, I can't recall what I did that day.

Q. Well, you can't recall what you did that day?

A. You mean after I left there?

Q. Yes.

A. I know I came in town but what my business were——

Q. You don't remember where you went in town?      A. I came in town.

Q. Did you meet Minnie again that day?

A. Yes, later part in the afternoon.

Q. About what time?

A. Somewhere around 4:00 o'clock, something like it.

Q. And where did you meet her?

A. Sister-in-law's place.

Q. Is that the lady that was here?

A. That's right.

Q. Mr. Kong, didn't you call Minnie about 1:30 from the Kalihi Market?

A. I did call her, yes. I did call her.

Q. And didn't Minnie meet you there about that time?

(Testimony of Stephen Kong, Jr.)

A. Yes, yes. She came down to meet me.

Q. And didn't you buy a case of beer there at that time?      A. Yes, I did. [83]

Q. And took it to Mrs. Gohier's house?

A. Yes.

Q. And that was about 1:30, wasn't it, approximately?      A. Yes.

Q. How long did you stay at Mrs. Lillian Gohier's house?

A. We were going to spend the night there.

Q. Well, how long did you stay there?

A. Stayed there—if I recall we slept over there that night.

Q. You slept there that Saturday night?

A. I think we did.

Q. Well, you didn't stay there from 1:30 on until the time you went to bed, did you?

A. Oh, no, no, in the latter part we were—we went marketing again, I think, something like that.

Q. How much of the beer did you drink that afternoon, Mr. Kong?      A. I can't remember.

Q. Well, was it two cans or six cans or ten or what? What is your best estimate?

A. Prior to—I went to Peneku's—prior to I went to Peneku's place I think I had about three or four, somewhere around there.

Q. Well, the case was empty by the time you went to [84] Peneku's house, wasn't it?

A. I don't know.

Q. There wasn't any more beer left in the house, was there?      A. I don't know.



(Testimony of Stephen Kong, Jr.)

Q. Well, didn't you stop at a store on the way over to Peneku's house and get some more beer?

A. No; went marketing. And if I am not mistaken, I think Minnie called her grandfather and asked him if he cared for some beer. Then I bought six more cans.

Q. You bought six more cans after you bought the case earlier?

A. Yes, I bought the case earlier. That was for Lillian.

Q. Now, Mr. Kong, during the afternoon when you were at Mrs. Lillian Gohier's house, didn't you ask Minnie what kind of a guy is this same Peneku, and didn't she say he is a good Hawaiian and minds his own business? Do you remember that?

A. No.

Q. Did you ask her during that afternoon what kind of a guy Sam Peneku is?

A. No, I didn't.

Q. Are you sure of that?

A. You mean after I got there?

Q. I mean right there that afternoon when you were in [85] the house?

The Court: What house?

Q. Mrs. Lillian Gohier's house where you went with the case of beer?

A. You are talking about Gohier's house?

Q. You are talking about Gohier's house.

A. Yes.

Q. Do you remember if you asked Minnie that question?

(Testimony of Stephen Kong, Jr.)

A. Yes, I think I did ask her how is the family, how is Mr. Peneku, because she told me because Grandpa want us to go down there. So I say, so far as I have been around there he doesn't sound so friendly. So I asked Minnie what his attitude was.

Q. So you asked her what kind of a guy he was?

A. I asked what kind of person he is.

Q. Yes, what kind of person?           A. Yes.

Q. And what did you say the reason was you wanted to know that?

A. No reason at all. So she asked me we go over and get—

Q. No, I mean, Mr. Kong, what was the reason you were anxious to find out what sort of a man Mr. Peneku was?

Mr. Soares: Just a minute, if the Court please. That is a misstatement of the evidence. There is no evidence [86] that he was anxious to find out.

Mr. Richardson: I will amend it to that extent.

Q. (By Mr. Richardson): What was the reason you asked Minnie what kind of a man was Peneku?

A. Minnie want me to go to Mr. Peneku's house. Prior to that a few times I went there, he didn't show any friendship. So she say, she told me that that his ways. We go. So I went along with her.

Q. You knew that, didn't you?

A. Knew what?

Q. You knew he hadn't shown you any friendship before?

A. Well, that is why I said that he don't show

(Testimony of Stephen Kong, Jr.)

any friendship so why should I go down to Peneku's place.

Q. And that is the reason you asked what sort of a guy he is?

A. That is why I asked Minnie.

Q. Well, did you finally go over to Mr. Peneku's house the same night?

A. When Minnie asked me to go, I went.

Q. Do you remember telling Minnie that you wanted to meet Mr. Peneku?

A. Well, after she told me that he is not a bad sort of a guy, person, and she want me to meet him.

Q. My question was, Mr. Kong, do you remember telling Minnie you wanted to meet him? [87]

A. To meet Mr. Peneku?

Q. Yes.

A. After she told me he was a friendly guy, I said yes, I would like to meet him.

Q. So you did tell Minnie, then, that you wanted to meet Mr. Peneku? A. Yes, I did.

Q. Now, at that time you had been going to Minnie for over a year hadn't you? A. Yes.

Q. Why is it that you just decided at that time that you wanted to meet Mr. Peneku?

A. Because the first time I did ask Minnie what his attitude was toward me, as a friend——

Q. Well, you had seen him before, hadn't you, Mr. Kong?

A. Yes, I had seen him when I went over there to either pick the children or drop the children.

Q. When was it that you first found out that Mr. Peneku was on that jury in the Smith Act case?

(Testimony of Stephen Kong, Jr.)

A. I didn't find out.

Q. You didn't find out?

A. No, I never know he was on.

Q. Never know for how long?

A. I never know until I was called into here.

Q. Into this case? [88]           A. Into this case.

Q. That you didn't know that he was on that Smith Act jury?           A. No, I didn't know.

Q. Well, don't you remember some conversation there at the house about the Smith Act jury?

A. Which house?

Q. At Mr. Peneku's house.

A. They were talking, she was talking, the Mrs. was talking about the Smith Act.

Q. But he wasn't?           A. He wasn't talking.

Q. And you say that you didn't know at that time nor never did know until you came into court that Mr. Peneku was on that jury?

A. I knew Mr. Peneku—I mean, well, at the time when she was there talking because she told me that her husband was on the jury.

Q. What time was that?

A. That was when we got there, in the evening.

Q. This same Saturday we are talking about, November 8th?

A. Yes, that is when the Mrs. said that her husband is on the jury.

Q. Now, you did know it on that day, then, that he was [89] on the jury?

A. Yes, at the time, that evening.

Q. Now, you and Minnie, then, went on over to

(Testimony of Stephen Kong, Jr.)

Peneku's house? A. Yes, we went over.

Q. About what time?

A. Late in the evening. I wouldn't recall what time.

Q. And who was there, if you remember?

A. Mrs. Peneku, Peneku, Minnie, myself, her grandfather, and later on the daughter-in-law, Mr. Peneku's daughter-in-law.

Q. Did you all drink beer? Did all of you drink beer? A. No.

Q. How much beer did you take with you that time? A. Six cans.

Q. Who drank the beer, if you remember?

A. Minnie, her grandfather, the daughter-in-law, and myself.

Q. Did Mrs. Peneku drink any?

A. No; didn't care for any.

Q. Now, where was Mr. Peneku? Was he on the punee?

A. What's that? Yes, he was on the punee.

Q. And the rest of you were sitting around the table?

A. Yes, we were sitting around the table.

Q. Now, what did you talk about when you were sitting [90] around the table, Mr. Kong?

A. Talking—Mrs. Peneku was talking about her pheasant lei.

Q. Did you say anything about you going over to Maui to paint your mother's house?

A. Yes, I talked about going over and painting her house.

(Testimony of Stephen Kong, Jr.)

The Court: Louder.

Q. (By Mr. Richardson): Do you remember saying anything about Mrs. Bouslog at that time?

A. Yes, the first time I ever mentioned her name after that conversation.

Q. What did you say as best as you can recall?

A. Well, Mrs. Peneku asked me who my mother's attorney was, so I told her that I heard from my sister that she is having Harriet Bouslog.

Q. Did you say anything to the effect that she was friend of yours? A. No, I didn't say that.

Q. Didn't say that? Mrs. Peneku did say that she would like to be on the jury? I think you said that? A. Yes.

Q. And did she say if she were on the jury she would vote people guilty?

A. Yes, she said she would vote all guilty. [91]

Q. And what did you say to that?

A. I just said that it is not nice to talk about things like that.

Q. Now, where was Mr. Peneku all during the time that conversation was going on?

A. He was lying on the punee.

Q. Was he reading?

A. Yes, he was reading.

Q. Now, when was it, Mr. Kong, that you decided you wanted to have a talk with Mr. Peneku?

A. Well, just then I was going to ask I want to talk to him.

Q. Did you tell him you wanted to talk to him privately?

(Testimony of Stephen Kong, Jr.)

A. Yes, I told him that if he don't mind I want to talk to him about me and Minnie and about the family—

Q. Well, why was it you thought that had to be a private conversation, Mr. Kong?

A. Because I never liked her grandfather to know that I am going to talk about Minnie and myself.

Q. How was that again?

A. I didn't like to converse affairs between me and Minnie in front of her grandfather.

Q. You didn't like to talk about you and Minnie in front of her grandfather?      A. Yes. [92]

Q. Why?

A. So I said I would like to talk to him.

Q. Well, the grandfather knew that Minnie and you were going together, didn't he?      A. Yes.

Q. Well, why did you object to talking about you and Minnie in front of the grandfather?

A. Well, his attitude towards me which I feel wasn't polite to discuss in front of the grandfather.

Q. You mean, Mr. Kong, you mean Mr. Peneku's attitude toward you?      A. Yes.

Q. Is that why you didn't want to discuss?

A. Yes. In other words, when I came into the house I was formally introduced to him and he don't respond to it. So I thought, well, I should apologize even though I be there, I should apologize for coming over to the house, because the way he acted just like I wasn't welcome in the house.

Q. I can't understand you. The way he acted?

(Testimony of Stephen Kong, Jr.)

A. The way he acted.

Q. What was it you said after that?

A. That I wasn't welcome to the house.

Q. So you felt you had to talk to him about things?

A. Well, I apologized for being there.

Q. And you took him into this back room to apologize? [93]

A. I seen him on the side, that I want to talk to him privately about family affairs.

Q. And you got him back there and you apologized, is that right?

A. I told him I would like to be friends with him and I have been trying to and at times when I come there I consider him and he goes ahead and he tells me that he don't want to be friendly, and, I mean, he don't care to meet me. So I asked him why. I say, it is on account of Minnie and this and that? I am sorry I came over to the house.

Q. Then it was an apology that you didn't want the grandfather to hear, is that right?

Mr. Soares: We object to that as argument, if the Court please.

The Court: Overruled.

Mr. Richardson: Can you answer that, Mr. Kong?

A. Well, apologize, I apologized to him.

Q. (By Mr. Richardson): You apologized to Mr. Peneku? A. Because his attitude.

Q. Yes, but that is what you did? You apologized to him?



(Testimony of Stephen Kong, Jr.)

A. Told him I am sorry I came over to the house.

Q. And you didn't want the grandfather to hear you apologize to Mr. Peneku?

A. Yes, and tell him what I think about him and he [94] should—well, his attitude. The first moment I came into the house. And prior to that a few times I have been there, I nodded at him and this or that.

Q. Was Mr. Peneku mad when he came out of the room?

A. After we were talking about the family, this and that, I say, if that is why you want me over to your house, I will be too glad to go out of your house.

Q. Was Mr. Peneku mad when he came out of that room there?      A. He wasn't mad.

Q. Did he look like he was mad?

A. I don't know his looks, if he is mad or not mad.

Q. You say he was not mad?

A. To me, he wasn't mad.

Q. Well, what was he to you?

A. He wasn't mad.

Q. He was not mad?      A. No.

Q. Now, when you were back there in the room, did you say anything about asking him to do you a favor?      A. I did not.

Q. You didn't say that? Did you say anything to him about voting not guilty in the Smith Act case?      A. I did not.

Q. You did not? You didn't say anything to him

(Testimony of Stephen Kong, Jr.)

about [95] being broke and not having any money?

A. I did not.

Q. Now, Mr. Kong, you were interviewed by the Federal Bureau of Investigation about this case, weren't you? A. Yes, I was interviewed, yes.

Q. Do you remember when two agents of the bureau came down to see you?

A. In the fire station, yes.

Q. And you told them that you just didn't want to discuss the thing at all, didn't you?

A. I told them that—

Mr. Soares: Just a minute. I object to that as incompetent, irrelevant and immaterial. If counsel wants to show prior contradictory statements, that is another thing. It can be done under the statute in another way. But not for him to be putting questions at this time which we submit are improper.

Mr. Richardson: I am not trying to show prior contradictory statements.

The Court: Well, the fact that he indicated that he didn't want to speak to the F.B.I. is not relevant.

Mr. Richardson: That is no prior contradictory statement. I just wanted to show his actions at that time.

The Court: The objection is good.

Mr. Richardson: All right. [96]

Q. (By Mr. Richardson): Just one minute, sir. Mr. Kong, after this conversation with Mr. Peneku, you and Minnie left immediately, did you?

A. Yes, we left.

(Testimony of Stephen Kong, Jr.)

Q. And where did you go?

A. Went over to the Lillie Gohier's place.

Q. That is where you had been that afternoon?

A. Yes.

Q. Now, did Minnie ask you after you left Peneku's house, ask you what you had said to Mr. Peneku back in the room?

A. I don't recall if she asked me or not.

Q. Well, after you got back to Miss Lillian Gohier's house, didn't she ask you what you had said to him in the bedroom?

A. I don't recall asking me that.

Q. You don't recall that?

The Court: Said to whom?

Mr. Richardson: To her uncle. That is, to Mr. Peneku.

Q. (By Mr. Richardson): Didn't she ask you what you all had said back there?

A. I don't recall Minnie asking me that.

Q. Well, do you recall telling Minnie that if anybody asked her if you went into her bedroom for her to say she [97] didn't know?

A. I don't recall telling her that.

Q. You don't recall that at all? Mr. Kong, do you have a sister that is married to a man named Epstein?

Mr. Soares: We object to that as incompetent, irrelevant and immaterial and not proper cross-examination. It doesn't tend to prove or disprove any of the issues.

The Court: What is the purpose?

(Testimony of Stephen Kong, Jr.)

Mr. Richardson: Well, if your Honor please, just a matter of going into his background.

Mr. Soares: We object to it as being stated in the hearing and presence, if the Court please——

The Court: Do you have a purpose? You can come to the bench and disclose it.

Mr. Richardson: May we do that?

(The following occurred at the bench between Court and Counsel.)

Mr. Richardson: I was going to ask if her sister is married to Epstein, who is a member of the Communist Party. And if he is going to admit it. I don't know. That was the purpose.

Mr. Soares: Isn't that the worst kind of prejudicial testimony? It has nothing to do with this case at all.

The Court: The only relevancy it might have would [98] be in the area of some kind of motive. But just standing alone——

Mr. Richardson: I realize that.

The Court: I will sustain the objection.

Mr. Richardson: All right.

(The conference at the bench ended at this point.)

The Court: The objection is sustained.

Q. (By Mr. Richardson): Mr. Kong, you say you didn't know that Mr. Peneku was on the jury until Mrs. Peneku said something about it there that night when you were sitting around the table?

A. That's right.

(Testimony of Stephen Kong, Jr.)

Q. Don't you recall that you asked Minnie that morning, that you said, "Hey, your uncle is on the jury"? And she said, "Yes." Do you remember that?

A. I don't recall that.

Q. You deny that?

A. I don't recall asking her.

Q. Well, do you deny that it happened?

A. I don't recall asking her that.

Mr. Richardson: I think that's all.

Mr. Soares: No questions.

The Court: You are excused. Next witness.

(Witness excused.)

Mr. Soares: The defendant rests. [99]

The Court: Rebuttal?

Mr. Richardson: If your Honor please, there may be. Just one second.

(Mr. Richardson and F.B.I. agent confer.)

Mr. Richardson: Minnie Gohier. It is Minnie Kong, I suppose.

The Court: Very well.

### MINNIE KONG

a rebuttal witness, on behalf of the plaintiff, being duly sworn, testified as follows:

#### Direct Examination

The Court: Will you state your name?

The Witness: Minnie Kong.

The Court: You are the wife of the defendant?

The Witness: Yes.

(Testimony of Minnie Kong.)

The Court: You are over 21?

The Witness: Yes.

The Court: Where do you live?

The Witness: Kahaluu.

The Court: On this island?

The Witness: Yes.

The Court: Are you employed?

The Witness: No.

The Court: Are you a citizen of the United States?

The Witness: Yes.

The Court: Only? [100]

The Witness: Yes.

The Court: Take the witness.

Q. (By Mr. Richardson): Mrs. Kong, when did you and Mr. Kong get married?

A. Wednesday, the 12th.

Q. That is this past Wednesday? A. Yes.

Q. And, Mrs. Kong, do you remember the day in November of 1952 on Saturday when you and your present husband, Mr. Kong, went down to Mr. Peneku's house? A. Yes.

Q. On that day, November 8, 1952, did you have breakfast with Mr. Kong at Mr. Peneku's house on that day? A. I did.

Q. And then later on you all left, didn't you, with Mr. Kong, you left Peneku, that is, after breakfast, sometime after breakfast you and Mr. Kong left, is that right?

A. I don't remember.

(Testimony of Minnie Kong.)

Q. Well, how long did you stay there after breakfast? How long did you stay?

A. Well, after breakfast I stayed around a little while.

Q. You did?           A. Yes.

Q. Did Mr. Kong leave?

A. Yes, he left. [101]

Q. And you stayed? Well, did Mr. Kong call you about 1:30 that day?           A. Yes.

Q. And did you meet him after that?

A. Yes.

Q. Did you all buy a case of beer?

A. Yes.

Q. And you went to Mrs. Lillian Gohier's house?

A. Yes.

Q. Now, Mrs. Kong, do you remember if your husband didn't ask you that afternoon whether or not your husband was on the jury—that is, whether or not your uncle was on the jury? Excuse me.

Mr. Soares: I object to the question as being leading and suggestive and not proper rebuttal and that no foundation has been laid as to what Mr. Kong may have said.

The Court: Overruled.

Q. (By Mr. Richardson): Do you remember if he asked you if your uncle was on the jury?

Mr. Soares: Meaning did Kong ask her?

Mr. Richardson: Yes, if Kong didn't ask you that afternoon whether your uncle was on the jury.

A. I don't remember.

Q. You don't remember that at all?

(Testimony of Minnie Kong.)

A. I don't remember. [102]

Q. You just can't recall, is that it?

A. Yes, I mean I can't recall.

Q. All right. Mrs. Kong, did sometime that afternoon before you went back to Mr. Peneku's house, did the defendant ask you what kind of a guy is your uncle, Sam Peneku? Do you remember that?

A. Yes.

Q. And do you remember what you told him?

The Court: Just a minute. You will have to answer instead of shaking your head.

A. Yes. I am sorry.

Q. (By Mr. Richardson): And what did you tell him?

A. Well, I said my uncle is a nice fellow. He is quiet. He minds his own business. He hardly talks.

Q. Now, Mrs. Kong, after you left the Peneku's house that night and started back to Mrs. Lillian Gohier's house, did you ask your husband, Mr. Kong, what he and Mr. Peneku had been talking about when they were back in the bedroom?

A. I can't recall that part.

Q. You can't recall that? Do you recall if you asked him what they were talking about and he told you if anybody asked you if he went to the bedroom to tell them that you did not know? Do you remember that?

A. I can't very well recall that part there.

Q. Mrs. Kong, you gave a statement to the [103] F.B.I., didn't you?

A. I did.

Q. Do you remember when you gave it? You



(Testimony of Minnie Kong.)

remember the time, the incident in which you gave it? Mrs. Kong, I will hand you a document consisting of five pages, and ask you if this is your signature on the bottom (handing a document to the witness)?       A. Yes.

Q. That is signed, "Mrs. Minnie Gohier"?

A. Yes.

The Court: What is the answer?

The Witness: Yes.

Q. (By Mr. Richardson): And that is your signature?       A. Yes.

Q. And you remember giving this statement to the F.B.I.?       A. Yes—

Q. Officers, do you not?       A. Yes.

Q. Was this statement true at the time you gave it, Mrs. Kong?       A. Yes.

Mr. Soares: We object to that as incompetent, irrelevant and immaterial, if the Court please.

The Court: Overruled. [104]

Mr. Richardson: If your Honor please, I would like to show it to her for the purpose of refreshing her recollection.

Q. (By Mr. Richardson): Now, will you take the statement there, Mrs. Kong and read it?

The Court: To herself?

Mr. Richardson: Yes, sir.

Q. (By Mr. Richardson): Now, Mrs. Kong, do you now recall?       A. Yes, I do.

Q. Whether or not Mr. Kong asked you that night—I beg your pardon. I will withdraw that. Do you now recall whether you asked Mr. Kong that

(Testimony of Minnie Kong.)

night what he and your uncle were talking about in the bedroom?      A. Yes.

Q. What did he tell you?

A. He said it was nothing.

Q. Did he further tell you that if anybody asked you about that, being in the bedroom, for you to say that you did not know?

Mr. Soares: We object to that as leading and suggestive, if the Court please.

The Court: It is, but the objection is overruled under these circumstances. Read the question to the witness.

(The reporter read the question.) [105]

A. I don't recall that.

Mr. Soares: What was the answer?

(The reporter read the last answer.)

Q. (By Mr. Richardson): Mrs. Kong, will you look at the paragraph on page 5 of this instrument—don't read it out loud, but read the words starting with this sentence (indicating). See if you now recall whether that happened?

A. Oh, he told me, when I asked him what did you talk to my uncle about, he said, oh, just forget about what I said to him in the room.

Q. Didn't he tell you, Mrs. Kong, if they ask whether I went into the bedroom, tell them you did not? Do you remember that?      A. Yes.

The Court: Wait a minute. What does that "yes" mean?

Q. (By Mr. Richardson): That is correct, then? He did tell you that?

(Testimony of Minnie Kong.)

A. Yes, because I asked him what did he go into the bedroom for, and he said, "Forget about the bedroom."

Q. And did he tell you if they ask whether I went into the bedroom, tell them you did not know? Did he tell you that? A. Yes.

Q. He did tell you that? [106] A. Yes.

Q. Now, Mrs. Kong, also do you now recall, after looking at the statement, whether or not Mr. Kong asked you that morning, the morning of November 8, whether or not your uncle was on the jury?

A. You mean when he called in the morning time?

Q. Well, I don't know when he did ask you, but did he ask you that morning at some time whether or not your uncle was on the jury?

A. Yes, he asked.

Q. And did you tell him "Yes"?

A. That is what I said, yes.

Q. You told him that morning that your uncle was on the jury? A. Yes.

Q. That is, you told Mr. Kong? A. Yes.

Mr. Soares: May I see that?

(Mr. Richardson hands document to Mr. Soares.)

Mr. Richardson: I think that's all.

The Court: Very well. Cross-examination?

### Cross-Examination

By Mr. Soares:

Q. With reference to this statement——

(Testimony of Minnie Kong.)

The Court: Excuse me. It is almost 3:00 [107] o'clock. We will take a recess. Then you can cross-examine.

(A recess was taken at 2:58 p.m.)

#### After Recess

The Court: Note the presence of the jury and of the defendant together with counsel. You may cross-examine.

Q. (By Mr. Soares): This statement which Mr. Richardson showed you, in whose handwriting is it? A. That is my handwriting.

Q. All of it? A. Yes.

Q. Did you have anything to copy from?

A. No.

Q. Did anybody tell you what to put in there of anything?

A. Well, there is a little paragraph down at the bottom that Mr. Albrecht—

Q. Is that in your handwriting?

A. Yes, that is in my handwriting.

Q. You write differently. Sometimes vertical and sometimes slant, do you?

A. I write about the same all the time.

Q. And the first paragraph, did you put that in there or did they tell you to put that in?

A. No, they put that in.

Q. They put it? [108]

A. You mean the above on the sheet there, the beginning of the paper?

Q. Yes, the very beginning.

(Testimony of Minnie Kong.)

A. Oh, they put that there.

The Court: Do you want to look at what you are talking about? You can if you wish.

Mr. Soares: If there is any question about it.

The Court: If she would look at the statement—

Q. (By Mr. Soares): This first paragraph, is that your language or did they tell you to write that? A. No, that is their language.

The Court: But it is in your handwriting?

The Witness: No, this here isn't my handwriting. I just signed the last page here.

The Court: Well, you first said the entire statement, as I understood you, was in your handwriting.

The Witness: No, I thought he was talking about this statement at the bottom here.

The Court: Clear that up.

Q. (By Mr. Soares): In other words, Mrs. Kong, the only thing that is in your handwriting is the signature at the bottom of each page and four lines, before your signature on the last one?

A. Yes.

Q. Do you remember that when you left your sister's [109] to go to your aunt's, to your Aunt Emma's—

The Court: Wait a minute. This is a new one.

Mr. Soares: Pardon?

The Court: This is a new one. -

Mr. Soares: Well, I am putting my question.

The Witness: My sister-in-law.

Mr. Soares: I see.

(Testimony of Minnie Kong.)

Q. (By Mr. Soares): When you left your sister-in-law, Lillian's? A. Yes.

Q. To go to your Aunt Emma's, that is when Stephen said he would, too, and you did not want him to go?

A. Yes, because I was just going to run down there to pick up some rolls just for a little short time.

Q. And——

The Court: Just a minute. I am lost. Who is Auna Emma?

Mr. Soares: Mrs. Peneku.

The Witness: Mrs. Peneku.

Q. (By Mr. Soares): That's right, isn't it?

A. Yes, Mrs. Peneku.

Q. And you told the F.B.I. people that you did not want Steve to go with you because your folks did not like Steve? That is true, isn't it?

A. Yes, in a way, because I was just going to go down [110] there just for about five minutes.

Q. And it is true that you knew your folks, meaning Mr. and Mrs. Peneku, did not like Steve?

A. Yes.

Q. And when you asked Kong what was said in the room, you thought that he had gone in there to talk about you, did you not?

Mr. Richardson: I object to that, if your Honor please. Mr. Soares is telling her what she thought.

Mr. Soares: Well, I will reframe it.

Q. (By Mr. Soares): When you asked Kong what they had talked about in the room, you told

(Testimony of Minnie Kong.)

the F.B.I. that you thought that he was talking about you?

Mr. Richardson: I still object to that question, if your Honor please.

The Court: Sustained.

The Witness: Well, I was wondering——

The Court: Just a minute.

Mr. Soares: I don't want to transgress the Court's ruling, but I would like to put the question this way:

Q. Did you tell the F.B.I. that you thought Kong had gone into the room to talk about you?

A. Yes.

Q. Just a minute. Let the Court rule.

The Court: All right. [111]

Q. (By Mr. Soares): And did you really think so?

Mr. Richardson: I object to that.

Q. (By Mr. Soares): Was that true?

A. Yes.

Q. Now, Mrs. Kong, when Mr. Richardson showed you this statement in order to refresh your recollection, he had asked you whether it was true that Kong had said that, if anybody asked you whether you went into the room to say you did not know? Now——

The Court: I don't think you have that quite right.

Mr. Soares: I am subject to being corrected.

The Court: As you have it worded, it is that she

(Testimony of Minnie Kong.)

went into the room. I don't think she meant that.

Mr. Soares: What I meant was—well, I will reframe it.

Q. (By Mr. Soares): When Mr. Richardson showed you this paper, in order to refresh your recollection, you having said that you did not recall whether Kong had told you that if anybody asked you if you went into the room to say that you did not know, and your attention was directed, was it not—

The Court: Excuse me. You made the same mistake again.

Mr. Soares: Did I say "she"?

Q. (By Mr. Soares): Whether Kong went into the room, to say [112] you did not know? And you said you don't recall. Your attention was directed, was it not, to this language, "If they ask whether I went into the room, tell them you did not know"? That is what Mr. Richardson pointed to, wasn't it, in that connection?

A. I don't remember—no. This morning he didn't go over that part there.

Q. I understand.

A. He just asked me if the things I said do I remember.

Q. That's right, and he asked you to remember—you remember Mr. Richardson asked you whether Mr. Kong had not told you that if anybody asked you about Kong going into the room to say you did not know? And your first answer was, "I do not



(Testimony of Minnie Kong.)

recall." Then Mr. Richardson showed you this paper and I got the impression that he directed your attention to certain language in the paper. Now, I am trying to find out——

The Court: On page 5.

Q. (Continuing): ——on page 5—yes—trying to find out if that language is not the language which reads, "Steve said if they ask whether I went into the bedroom tell them you did not know." That is what refreshed your recollection, was it not?

A. Yes.

Mr. Soares: No further questions. [113]

Mr. Richardson: No further questions.

The Court: You are excused. Next witness.

(Witness excused.)

Mr. Richardson: We have nothing further for rebuttal.

The Court: Surrebuttal?

Mr. Soares: No surrebuttal.

The Court: Very well. The evidence is concluded. Do you have your requested instructions ready?

Mr. Soares: Not mine.

Mr. Richardson: I will only have one. I have it here.

The Court: Do you have any special ones?

Mr. Soares: Pardon me?

The Court: Do you have any special ones?

Mr. Soares: Well, I did want to make some requests, particularly with reference to the definitions

of language used in the indictment over and above the usual ones, the so-called stock instructions, which is an improper term.

The Court: I don't recall any peculiar words. Well, I want to know whether or not the ladies and gentlemen of the jury wish to stay and conclude this case today, whether they want to come back tomorrow morning and finish it, and the finishing touches take on the matter of arguments by counsel and instructions by the Court. It is a matter of probably two [114] to three hours before the case will be in your hands. Or do you want to let it rest until Monday? I am conscious of the fact that some of you come from other islands and it may be that you are anxious, if possible, consistent with your obligations in this case, to get home. So I simply want to know what you would like to do. You may chat among yourselves on the time factor and see what the concensus of opinion is. Is it tonight, tomorrow or Monday?

(After a short discussion, the jurors agreed on Monday.)

The Court: Monday. All right. Very well, then. I will have the jury report at 10:00 o'clock on Monday and I will have the lawyers report to me on that morning at the hour of 8:30 together with their requested instructions. I will advise them, now, as usual, that I have stock instructions at hand and I can't conceive of any particularly voluminous, fancy instructions being needed. So if you will just

bring in, without duplication, the ones you think should be given in addition to the standard instructions, we will make better progress, and we should be through in time for you to get your breath before the jury reports at 10:00, at time you may argue to the jury. Now, this being a week end, I underscore that which I told you earlier, not to discuss this case with anyone, including fellow jurors, not to allow anyone to discuss it in your presence, not to read anything [115] about it or to hear anything said about it over the radio or TV. That, of course, doesn't mean that you can't continue living a normal life. It just means that you must ignore any references to this case, should you accidentally come in contact with them. And I have also indicated to you earlier and underscore again that if anyone in this or any other case should ever attempt to talk to you about it, directly or indirectly, I want you to report that fact to the Court. So until Monday morning for the jurors at the hour of 10, they are excused, and the attorneys until 8:30.

(The Court adjourned at 3:28 p.m.) [116]

August 17, 1953

(The trial resumed at 10:10 a.m.)

**The Clerk:** Criminal No. 10,704, United States of America, plaintiff, vs. Stephen Kong, defendant, for further trial.

**The Court:** Note the presence of the jury and of the defendant together with counsel.

Mr. Soares: If the Court please, as indicated in our early session, at this time I should like to make a formal motion in the presence of the jury——

The Court: Yes.

Mr. Soares: ——which is that the prosecution be required to elect on what they are relying for the conviction, as to which of the defenses described in the indictment they rely on conviction as between an endeavor to influence or to obstruct or to impede justice, the same with reference to the juror, Peneku.

The Court: Having discussed this matter with you when the jury was not present and the client was not present, I indicated to you what my ruling would be when these people were present. And, therefore, I will at this time announce that your motion is denied. There is no cause for an election as the indictment is not duplicitous.

Mr. Soares: I would like, then, to move for a [117] judgment of acquittal on each of the grounds heretofore laid in the motion to dismiss the indictment and with reference to the indictment itself that it is insufficient in that it merely charges the defendant did endeavor to influence the due administration of justice, whereas it does not allege that he did so corruptly; that it does not indicate the matter in which the due administration of justice was attempted to be interfered with and it is not clear from the indictment whether the charge is an endeavor to influence the juror or the due administration of justice or both. Further, that

there is no evidence, at least no evidence amounting to more than a mere scintilla of an endeavor that the defendant acted corruptly and no evidence of motive.

The Court: Likewise upon each of the grounds urged, the motion for judgment of acquittal is denied. Very well.

At this time, the evidence being concluded, the attorneys may present to the jury argument designed to be helpful to the jury in evaluating the evidence which they have heard, and with the general understanding of what the applicable will be when given to you by the Court's instructions. Bear in mind that the argument of counsel is not evidence but is merely an evaluation from the standpoint of the respective attorneys' clients, as to how they think the evidence should be evaluated by you. Should they make any reference to rules of law which I do not recommend that they [118] do other than generally, bear in mind that the law you will take from the Court later and not from the attorneys. The parties having the burden of proof, the government, have the privilege of presenting an opening argument and a rebuttal argument. Therefore, it may be heard twice. The defendant, having no burden, simply present an argument following the government's opening argument. At this time, Mr. Richardson, you may present your opening argument.

(Mr. Richardson presented the opening argument on behalf of the plaintiff.)

(Mr. Soares presented the argument on behalf of the defendant.)

The Court: We will take a short recess.

(A recess was taken at 10:55 a.m.)

#### After Recess

The Court: Note the presence of the jury and of the defendant together with counsel. You may conclude with your argument, Mr. Richardson.

(Mr. Richardson presented the closing argument on behalf of the plaintiff.)

#### INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, to refresh your recollection of exactly what it is you have to decide, let me reread to you the indictment, stressing, as I [119] do, that it is, as I have told you, a mere specification of the charge of that which the government undertakes to prove beyond a reasonable doubt, and is in no way to be deemed by you as evidence. But it is charged and the government has undertaken to argue that it has proven by the evidence introduced, that the defendant denies:

“That on or about November 8, 1952, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Stephen Kong, Jr., did endeavor to influence, obstruct and impede the due administration of justice in that he did knowingly, wilfully, unlawfully, feloniously and

corruptly endeavor to influence, intimidate and impede Samson Nani Peneku, the said Samson Nani Peneku being then and there a trial juror duly impanelled and sworn in the case of United States vs. Charles Fujimoto, et al., Criminal No. 10,495, pending in the United States District Court for the Territory of Hawaii, in violation of Section 1503, Title 18, United States Code.”

Now, insofar as we are here concerned, the statute upon which this charge is predicated is to be found in Title 18 of the U. S. Code, Section 1503. It is a statute designed to protect the due administration of justice in the federal courts, in the federal area. And the particular clause upon which this prosecution is predicated is that part of the statute which reads: [120]

“Whoever corruptly, or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct and impede the due administration of justice \* \* \*”

Shall be punished.

Now, it is here charged in this indictment that this defendant did unlawfully endeavor to influence, obstruct and impede the due administration of justice by attempting to intimidate, influence and impede Samson N. Peneku in the discharge of his duty as a juror in a certain case then pending in the federal court, and in this particular federal court. So that is the issue you have to try, as to whether or not this defendant beyond all reasonable doubt

did an act of the type described here in an endeavor to impede the administration of justice and that he did that act with a criminal intent.

I have to give you at this time a number of general instructions that are applicable to nearly every criminal case, and though many of you may be familiar with them by virtue of having heard them referred to in other cases, it is this case in which they must be given anew because in this case it is the defendant's liberty that is at issue, and consequently I ask for your undivided attention in regard to comprehending and understanding these general instructions.

First of all, as I have told you, you are to take the law from the Court and not from the lawyers. And you are [121] to single out any one specific instruction of mine and give it any undue weight but are to consider the instructions as a whole. Naturally, of course, you are to decide this case solely upon the evidence that has been presented here, and any and all inferences that may reasonably be drawn therefrom.

In evaluating the evidence you are expected to apply thereto your common knowledge and common experience as jurors. To clarify that statement, it is not your experience as jurors that you are to apply, but you are called to serve as jurors because you do have a fund of common knowledge and common experience which you can have recourse to in evaluating the evidence that you have heard, in the exercise of judgment in evaluating the same. But



you still must decide this case solely upon the evidence that you have heard in court.

Now, what is evidence? It consists of two classes, and each kind is recognized and admitted in courts of justice and upon either or both, if adequately convincing, juries may lawfully find an accused guilty of crime. The first class is known as direct evidence and the second class is known as circumstantial evidence.

Direct evidence of the commission of a crime consists of the testimony of every witness who with any of his own physical senses perceived any of the conducts constituting the crime charged, and which testimony relates to that which was perceived. All other evidence admitted in the trial is [122] circumstantial. And so far as it shows any acts, declarations, conditions, or other circumstances tending to prove a crime in question or tending to connect the defendant with the commission of such a crime, may be considered by you in arriving at a verdict.

The law makes no distinction between circumstantial and direct evidence, but respects each for the convincing force it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries a convincing quality required by law, as will be stated in these instructions.

Of course, if during this trial I have done anything or said anything which suggests to you that I am inclined to favor the claims or positions of either party, I want you to disregard the same and

let not the same influence you. I have not expressed nor intended to express nor have I intended to intimate the opinion as to which witnesses were or were not worthy of belief, and which influences are to be drawn from the evidence. If any expression of mine seems to indicate an opinion relating to these matters, I instruct you to disregard it.

At times, during the course of the trial, I have been called upon to make rulings upon objections and to keep the record straight I have occasionally stepped into the situation to make sure that no misleading evidence or any [123] ambiguity is created unnecessarily. But from my rulings and actions, to present to you the evidence clearly and unobstructed, as clearly as possible, you are not to draw any inferences one way or another, for my rulings and my general supervision of the conduct of this trial is not evidence.

You are, of course, not to be concerned with evidence that has been rejected and if there has been, as there has been, some evidence which I have stricken, you are, of course, not to consider the same. It is as though the stricken evidence was not heard by you at all.

You are to bear in mind, too, that it is only the answers to questions that constitute the evidence given by a witness. Unanswered questions, questions that have been ruled on as objectionable and left unanswered are, of course, not either evidence or any basis for any inference.

Of course, there have been times during the trial when counsel have approached the bench to discuss

some matter with me. You are not to feel offended because we didn't take you into our confidence at that time, but we were discussing matters of law to determine whether or not certain things should or should not be heard by you. But you are to be offended for not being included in any of these bench conferences.

I would have, and do have, the right to comment upon the evidence and I may do so in some areas, but I do not [124] presently plan to. But if I do, I want you to bear in mind that I am simply exercising the prerogative of a judge in a federal court, but in no way am I in so doing desirous or attempting to interfere with your exclusive province of determining the credibility of the witnesses and the weight of the evidence, for you and you alone are the exclusive judges of the facts, of the effect and value of the evidence.

Now, what about this matter of credibility? A great deal turns in most cases and in this upon the believability of the witnesses who testify. And, as I have just said, you are the sole judges of the believability of the witnesses and of the weight which is to be given by you to their testimony.

First of all, a witness is presumed to speak the truth. And this presumption, however, is one that may be rebutted by the manner in which the person testifies, by the character of the testimony, or by evidence affecting his reputation for truth, honesty and integrity or his motives or by contradictory evidence.

In testing the credibility of the witnesses in this case, you may believe the whole or any part of the

evidence of any witness or you may disbelieve the whole or any part of it as may be dictated by your exclusive judgment as reasonable persons. You should carefully scrutinize the testimony given and in so doing consider all of the circumstances [125] under which any witness has testified, considering his conduct on the witness stand, his attitude—or hers—and whenever I use the masculine pronoun that includes the female as well—his demeanor, conduct on the witness stand, his intelligence, the relations which he bears to a party, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if any at all, and by every matter that tends reasonably to shed light upon that witness' believability. The witness, of course, may be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial. A witness who is wilfully false in one material part of his testimony is to be distrusted in others. The jury may reject the whole of a testimony of a witness who has wilfully sworn falsely to a material point. If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with design for the purpose of misleading and deceiving you jurors, then you may treat all of his or her testimony with distrust and suspicion and reject all unless you should be convinced that he or she has in other particulars sworn to the truth.

Nothing turns on the number of witnesses produced by either side, for the testimony of one witness worthy of belief is sufficient for the proof of any fact and would [126] justify a verdict in accordance with such testimony, even though a number of witnesses testified to the contrary if from the whole case, considering the credibility of the witnesses, and after weighing the various factors in evidence, you should believe that there was a balance of probability pointing to the accuracy and honesty of the one witness. Therefore, you are not bound to decide in conformity to the testimony of a number of witnesses which does not produce conviction in your minds as against declarations of a lesser number or a presumption of other evidence which appeals to your minds in more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from the beliefs or prejudice or from a desire to favor one side as against another. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not the relative number of witnesses but the relative convincing force of evidence.

As I told you at the outset in this, as in every criminal case, from the filing of the indictment or accusation no presumption whatsoever arises to indicate the defendant is guilty, or that the defendant has any connection with or responsibility for the

crime charged in the indictment, for the fact is that there is a rule of law that a defendant is presumed to be innocent at all stages of the proceedings [127] until, if ever, the evidence shows such defendant to be guilty as charged beyond a reasonable doubt. This presumption of innocence follows the defendant to the jury room to be weighed by you as evidence along with other evidence.

A defendant does not need to testify. He may remain silent. And no adverse inference may be drawn by the jury from the fact that he elects not to testify. However, he also has a right to testify if he so desires, but when he does so testify his testimony is to be evaluated in the same manner as you evaluate the testimony of any other witness.

If the evidence in this case as to any particular count—and there is only one count here—is susceptible of two constructions or evaluations, much of which appears to be reasonable and one which points to the guilt of a defendant and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt. You will notice that this rule applies only where both of the two possible opposing conclusions appear to your mind to be reasonable, and the other unreasonable, it would be your duty to adhere to the reasonable deduction and reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to the defendant's guilt, the entire proof must carry the convincing

force required by law to support a verdict of [128] guilty.

It goes without saying that the defendant is on trial for only that which is charged in this indictment and for nothing else. You will notice the indictment uses the words “knowingly, wilfully, unlawfully, and feloniously.” And it adds one that doesn’t ordinarily appear in the average case, namely, “corruptly.” Those are all legal words of art. Let me tell you what they mean as they are used here in this connection. When the law charges something with having been knowingly done, it does so for the purpose of insuring that no one should be convicted or could be convicted of a crime because of a mistake or inadvertence or for other innocent reasons. The law punishes only the doing of prohibited acts with a criminal intent. If there is no criminal intent, the act is not in and of itself a crime, under most circumstances, such as here. Thus the word “knowingly” is used here to make sure that you are able to find beyond a reasonable doubt, should you convict, that the defendant knew what he was doing.

“Wilfully.” You will find that word likewise means just about what it means in other circumstances, and it does not greatly change its meaning because it is used in a legal connection. However, it does mean in this regard that the government must prove that the act which is prohibited by the statute was not only done, as I have said, knowingly, but wilfully, meaning deliberately with a bad pur-

pose or evil motive or without grounds for believing the act to be lawful. [129]

Now, concerning ignorance of the law. That is commonly said to be no excuse, and that is true. However, ignorance of the law may be relative to the question of whether or not a person acted with a criminal intent.

I have not defined for you the words "feloniously" and "corruptly." Let me do so. "Feloniously" means done with an evil intent, a criminal intent. And so, too, the word "corruptly" as used in this connection. It means that it is done, as I have indicated, with a bad purpose or evil motive, without grounds for believing it to be lawful, with a criminal intent.

Now, what is a criminal intent that these words "knowingly, wilfully, feloniously and corruptly" seemingly add up to? And which I have said must accompany the doing of a prohibited act in order to constitute a crime. How do you recognize this criminal intent? How is it proven? In answering those rhetorical questions, let me say to you that criminal intent may be proven by circumstantial evidence, and it is rarely proved in any other way because, although witnesses may see and hear and thus be able to report correctly that which a defendant does or fails to do, there can be in the nature of things no eye-witness account of the state of a person's mind. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. Intent may be inferred



from all of the evidence in the case, [130] including any acts done and statements made by the accused. The jury should consider all of the facts and circumstances in evidence which may aid the determination of the issue as to intent. In that connection let me say to you that the law also is that a man is intended to presume the natural and probable conditions of his acts, acts which he does knowingly, wilfully, and so forth.

As experienced jurors you know that you are in no way to be concerned with what would happen in the event you should return or did return a verdict of guilty. The matter of prescribing the punishment that would flow from a conviction is exclusively within the power of the Court and is in no way to be considered by you in arriving at your verdict. You are simply judges of the facts and of the credibility of the evidence. And when you have determined the facts and applied the law thereto, you have done your duty and you should not be and must not be concerned with duties that do not come within the scope of your oaths as trial jurors.

Now, in conclusion, let me give you one or two more or less specific charges, and again to orient you I invite your attention to the fact that the overall charge is that the defendant did unlawfully endeavor to influence, obstruct and impede the due administration of justice. What does that mean? It means, as perhaps I have indicated, that there are proper and improper ways of influencing the

administration of [131] justice. And this law that I have referred to as forming the basis of this charge is concerned only with the improper methods of influencing the administration of justice. Let me illustrate it.

Here, for the purpose of properly influencing the administration of justice, you ladies and gentlemen have been sworn as trial jurors and to influence you properly the law has allowed into evidence certain testimony and on the basis thereof, again by way of properly influencing you, the Court in accordance with the tradition and custom has allowed arguments to be presented to you by attorneys. I say that by way of contrasting proper from improper. Now, this charge is, improperly influencing the administration of justice.

Now, the word "endeavor" as used. That word means exactly what you think it means, namely, to attempt, to try. It does not mean that the attempt has to be successful. It might be, but it doesn't have to be. The thing that is declared to be wrong is the attempting, the trying to influence the administration of justice improperly, whether that succeeds or not.

Now, how was it, according to this charge, that the defendant is said to have unlawfully endeavored to impede the due administration of justice? As I mentioned before, it says in that he did endeavor—to paraphrase—he did endeavor to improperly influence a juror in the discharge of his duties [132] as a juror in a certain case described as United

States v. Fujimoto then pending in this court. Whether he did or not is for you to determine from the evidence, to be sure. And if he did so, you must find that he did so with a criminal intent. And, therefore, I tell you that you cannot find the defendant guilty unless you are unanimously agreed and your verdict must be a unanimous one that the defendant corruptly endeavored, that is, with a criminal intent endeavored to influence, obstruct and impede the discharge of Mr. Peneku's duty as a trial juror in the case of United States vs. Fujimoto, Criminal No. 10,495, then pending in this court.

So by way of summarization I will come to the matter of reasonable doubt. The government must prove to your satisfaction beyond a reasonable doubt in this case that the defendant, with a criminal intent, tried to influence, obstruct and impede the due administration of justice by trying corruptly to influence, intimidate and impede the juror Peneku in the discharge of his duties as a juror in the case of United States vs. Fujimoto. If you do not find that those elements have been proven to your satisfaction beyond a reasonable doubt, you must then acquit. If you do find that they have been proven beyond a reasonable doubt to the satisfaction of each of you jurors, then your duty is under your oath to convict.

You will notice that I have said nothing about motive. Motive may be relevant but it is not an essential element of [133] intent. It may help to

establish intent. The lack of it may throw some light on whether or not there was any criminal intent at all. But in and of itself, motive is not an essential element.

And now, in conclusion, regarding these elements that I have said must be proven to entitle the government to a verdict of guilty, proven beyond a reasonable doubt, I will define for you what is meant by a reasonable doubt. Perhaps some of you could recite it from memory. But whether you could or not, listen to it again carefully because it is the key instruction here, for it describes the government's burden or proof which obtains in this and every criminal case. When we say that the government must prove its case beyond a reasonable doubt in order to be entitled to a verdict of guilty, we mean that a reasonable doubt is just such a doubt as the term implies. It is a doubt for which you can give a reason. But this reason must not arise from any merciful disposition or from any kindly, sympathetic feeling or from any desire to avoid performing a possibly disagreeable duty. The doubt, in order to come within this definition of a reasonable doubt, must be substantial doubt, such as an honest, sensible, fair-minded person might with reason entertain consistently with a conscientious desire to ascertain the truth and to perform a duty. It is such a doubt as would cause a person of ordinary prudence, sensibility and decision, in determining an issue of [134] great concern to himself to cause him to pause or hesitate in arriving at his

conclusion. It is, therefore, a doubt which may be created by the lack of evidence or it may be created by the evidence itself. But under no circumstance can a reasonable doubt be equated with a speculative, imaginary, or conjectural doubt.

When we say that the government must prove its case beyond a reasonable doubt, we do not mean that the government must prove guilt to a metaphysical certainty or proof positive. In human experience that is usually impossible. In any event, the law simply requires the government to prove a case to the point of being beyond any and all reasonable doubt. That means, as I have described to you, proof in accordance with the definition that I have given you which expressed otherwise means that a juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the party charged.

And with that I conclude the instructions simply by saying that two forms of verdict will be given to you for your use. Use the form that meets and is in conformity with the verdict that you reach. And have your foreman sign the form that you use and notify the Court that you have arrived at a verdict. The Court will convene to receive the same. You may take the evidence to the jury room and you may take the indictment, although I don't think there is any tangible evidence in this case. [135]

The Clerk: No, your Honor.

The Court: In fact, there is none. And the indictment is not evidence, but you may take the speci-

fications of the charge with you to the jury room if you wish. And at this time, in accordance with rule and custom, if you will just step outside for a moment I will find out from the attorneys what it is that they think I might better say to you or say in addition to you, to be helpful to you. So if you will just step outside for a moment, I will do so.

(Jury leaves court room at 11:50 a.m.)

The Court: The jury is now absent from the court room and I will hear from the attorneys as to things that they think I have omitted or said improperly. Is there anything you wish to say that may come within the category of an exception?

Mr. Soares: I am not going over any of the things that we have heretofore objected to, but it did strike me that there wasn't sufficient reference to the provision of the statute that the endeavor must be a corrupt endeavor, unless I misunderstood your Honor. Even in reading the statute the Court did not include the reference, did not use the word "corrupt."

The Court: I do recall referring to the word "corrupt" twice, Mr. Soares, but I will be happy to clear it [136] for you if you have any doubt.

Mr. Soares: It is true that in summarizing your Honor did use that word, but I am particularly complaining about when the Court was quoting from the statute the Court stated, the Court started all right and began to read the first of those two last phrases and you did say, "whoever corruptly," and so on does the thing. Then when you came to

the instruction indicating that the reference was not to the accomplishment of the endeavor, but the endeavor itself, you did not, if I recall correctly, include the word "corrupt," which your Honor said during the course of the argument earlier qualified the word "endeavor."

And then again with reference to Peneku, the reference I think your Honor used was the word "improperly" rather than the word "corruptly."

The Court: I was paraphrasing the statute there, I think, in trying to compare a proper influencing with an improper influencing or unlawful.

Mr. Soares: I have reference to an earlier reference by the Court. In reading from the statute, your Honor said that simply by attempting to intimidate Peneku, intimidating but did not say by corrupting, attempting to or endeavoring to.

The Court: All right. I will be happy to make that clear when they come back. If you would like them back now——

Mr. Richardson: There is nothing for us. [137]

(Jury returns to court room at 11:53 a.m.)

The Court: The record may reflect the presence at this time of the jury and of the defendant together with counsel.

It has been suggested, ladies and gentlemen of the jury, that perhaps I haven't been as clear as I might have been and, therefore, with respect to a certain area that I have in mind I will try to repeat, being clearer than perhaps I have been in the past. I refer to the statute, 18 U. S. C. Section

1503. Nowhere does the statute use the words “knowingly, wilfully, unlawfully, and feloniously.” But it uses the words “corruptly” which as used implies those words, “knowingly, wilfully, unlawfully and feloniously,” meaning that the acts that are set forth in the statute as prohibited acts to constitute a violation must be acts done with a criminal intent. And, therefore, the statute says in this connection, with reference to the charge laid in this indictment, which is laid under the final clause and supplying the words “whoever” which is the very first word in the statute, it says here, “Whoever corruptly influences, obstructs, or impedes or endeavors \* \* \*” and at that point the word “corruptly” is to be understood as repeated, “or whoever corruptly endeavors to influence, obstruct or impede the due administration of justice \* \* \*”—shall be punished. So that with reference to this concept of “corrupt” or “corruptly” whenever you find it used in the [138] indictment you are to understand thereby that even though the statute doesn’t use the words “unlawfully, knowingly, wilfully or feloniously” that the concept of “corruptly” means that they are to be inferred for the word “corruptly” to repeat, means as used here that the act done must have been done with a criminal intent.

Very well. Anything further?

Mr. Soares: I think we can dispose of this if we come to the bench.

The Court: All right.

(The following occurred at the bench between Court and counsel:)



Mr. Soares: Again your Honor's last statement says, whenever in the indictment the word "corruptly" is used and is not used with reference to the charge that the defendant corruptly endeavored—that is the point I tried to make out there. It seems to me they should be told that if it isn't there it belongs there.

The Court: Belongs where?

Mr. Soares: In the charge, corruptly endeavors to influence. They haven't said that in the indictment.

The Court: Oh, yes, they did.

Mr. Soares: That is the big point I was trying to make.

The Court: Where is the indictment, Mr. [139] Clerk?

Mr. Soares: To impede Peneku and not the administration of justice.

The Court. And corruptly.

Mr. Soares: Endeavor to influence, intimidate Peneku. But not corruptly endeavor to impede the administration of justice.

The Court: Oh, I see what you mean. All right.

Mr. Richardson: Hadn't your Honor covered that?

Mr. Soares: It belongs there. And that is the one reason we complained about the indictment, because it isn't there.

The Court: All right. I get you.

(The conference at the bench ended at this point.)

The Court: Without changing anything that I have said to you with respect to this word "corruptly," it has been brought to my attention that in the third line of this indictment it says that the defendant did endeavor to influence, obstruct and impede the due administration of justice. Then it goes on in that he did thus and so. Now, with respect to the charging part, that he did endeavor to influence and obstruct and impede the due administration of justice, by way of interpreting the charge you have to drop down to the bottom where it says in violation of Section 1503 and that charge implies that he did it corruptly as the statute alleges, as the nature of the offense, which in turn means he did it with [140] a criminal intent. So that you are to understand the charge to be that the defendant did corruptly, that is, did with a criminal intent knowingly, wilfully, unlawfully and feloniously endeavor to influence, obstruct and impede the due administration of justice by doing thus and so. And, of course, "so" refers to the words used that follow the phrase "in that he did," so and so. Very well. Does that clear up the point?

Mr. Soares: Well, that meets the point, let us say.

The Court: All right. Now, the bailiff and matron will step forward and be sworn to take charge of the jury.

(Mr. Harry Tanaka and Mrs. Lily L. M. Deering were sworn to take charge of the jury.)

The Court: Very well. Your first order of busi-

ness, ladies and gentlemen of the jury, when you reach the jury room and close the door will be to select one of your number to function as foreman. Your second order of business would be to prepare to go to lunch. The third order of business will be to come back from lunch and then for the first time to close the door again and discuss this case and evaluate the evidence and apply the court's instructions to the facts as you find them to be, until you arrive at a verdict. After you reach a verdict, you will simply notify the Court to that effect and the Court will convene to receive your verdict. And until that time the Court will stand at recess in this case. The jury will go with the bailiff and [141] matron.

(The jury retired to deliberate the case at 12 o'clock noon.)

(The jury returned to the court room for further instructions at 5:17 p.m.)

The Court: Note the presence of the jury and of the defendant together with counsel. I am advised by the Clerk that I have a message from the jury which reads as follows; addressed to me:

"Your Honor, we, the jury, respectfully request a copy of your instructions as to the meaning of the words 'knowingly, wilfully, unlawfully, feloniously and corruptly,' as used in the indictment. Also clarify the meaning of 'criminal intent.'

"Respectfully, Samuel L. Chastain, Foreman."

Very well. I will comply with a part of your requests, but I cannot comply with the request for

a copy of the Court's instructions because I do not have copies to give to you and it is not my custom to give them even if they did exist. And, further, the mechanics of making copies of what I actually said are such that you would probably be detained unnecessarily long. So rather than comply with that portion of your request, I will go over this matter of criminal intent with you once again.

First of all you probably would wish to tell me that the law should be that you should not have jury trials during [142] kona weather. But be that as it may, we are in the midst of a trial, despite the unpleasantness of the weather and we will have to give our serious attention to what is the scope, the content and meaning of this term "criminal intent." I explained to you this morning that the law has classified crimes. There are some crimes that require no criminal intent. And there are some crimes that require a general criminal intent. And there are other crimes that require a specific criminal intent. The type of crimes that require no criminal intent are best illustrated by traffic offenses. If you go through a red light, whether you intended to or not the fact that you did the act of going through the red light constitutes the offense. That is called a *mala prohibita* type of crime. We are not concerned with that. The crime that is charged in this indictment is not that kind.

At the other extreme we have crimes that require what I have called a specific intent. For example, murder is an illustration. The charge or crime of murder requires a specific intent, a specific intent to

kill a human being. We are not concerned with that type of crime.

We are concerned with the middle class, the class within which falls most of the statutory offenses, namely, crimes that require the proof by the government of a general criminal intent or, as we lawyers call it, *mens rea*, a guilty mind. [143]

Now, I also explained to you this morning that the law in this category does not make the doing of a prohibited act a crime unless it is done with a criminal intent. And that is why the indictment talks about doing something knowingly, wilfully, feloniously and—may I see the indictment, Mr. Clerk? There may be another word there—unlawfully and corruptly. Well, generally speaking all of those adjectives add up to the fact that it is charged that an act was done with a criminal intent. And with respect to the component parts I have to define for you the contents of each of those words. And it is in keeping with this basic concept that the evil hand must be united with an evil mind in the doing of an act to constitute the crime.

Now, here it could be said with justification that this particular charge is not too artistically drawn, and these words, as you find them in the particular charge, are to a degree misplaced. However, I have told you that the charge is that on or about the date alleged the defendant did endeavor to influence, obstruct and impede the due administration of justice in violation of section 1503. Now, it is that concluding clause that saves the day by requiring an inference from that concluding clause

that the alleged act was done with a criminal intent. So that after the word "did" in the third line you are to understand that at that point the law inserts that it is charged that the act alleged was done with a criminal [144] intent. And thus you should read that as though it were written, "did knowingly, wilfully, unlawfully and feloniously endeavor to influence, obstruct and impede the due administration of justice."

Then you ask, how was that act supposed to have been done? What was the act that is alleged to have impeded the due administration of justice where it is charged that he "did knowingly, wilfully, unlawfully, feloniously and corruptly endeavor to influence, intimidate, impede Samson N. Peneku," and so forth in the discharge of his duty as a juror in the case of United States vs. Fujimoto? The latter phraseology is not an exact quote, but it is a paraphrasing by me of the substance of the allegation in that regard. Now, actually these words which are misplaced, which should be read after the word "did" as I have mentioned, are in the nature superfluous words except that as it is worded here they are not for they are repeated at this point expressly for the purpose of indicating that what was done with reference to this juror Peneku was done to interfere with him in the discharge of his duties as a juror. So that here you must be able, as I told you before, to arrive at a verdict of guilty to find that the government has proven beyond a reasonable doubt that the defendant did the act of corruptly endeavoring to influence, intimidate and

impede Samson N. Peneku who was then a juror in that particular case.

Now, I say "corruptly endeavored." That implies also [145] criminal intent. Now, that is the act you must find was done, namely, endeavored to influence, intimidate, impede Samson N. Peneku corruptly, that is, with a criminal intent. So you must next find, if you can, from the evidence in order to reach a conclusion of guilt, that the act of endeavoring to influence, intimidate and impede the juror Peneku, that it was done with a criminal intent, namely, done with a guilty mind, knowing it was wrong, knowing that it was the doing of an act that was prohibited by law.

Now, I have also told you that criminal intent is never proven by direct evidence, because you cannot read a man's mind except from circumstantial evidence, and men are understood to intend—being sane people—to intend the natural and probable consequence of their acts. So if you find that this individual charged here did the act prohibited by statute intentionally and with an evil disposition, then you would have the combination of the guilty hand and the guilty mind going together which constitutes the doing of an act with a criminal intent.

Now, if either of those elements are lacking, your verdict must be a verdict of not guilty.

So, to repeat myself, you have asked me to again define the words "knowingly, wilfully, unlawfully, feloniously and corruptly," and to also clarify the meaning of "criminal intent." Well, all of those words, "knowingly, wilfully, [146] unlawfully, felo-

niously and corruptly," are elements that are badges of criminal intent. And if an act was done in the manner described, namely, knowingly, wilfully, unlawfully, feloniously and corruptly and was a prohibited act, it would then be done with a criminal intent.

To repeat, "knowingly" means to have been conscious of what you were doing. For example, that you weren't walking in your sleep or that you weren't under the influence of some drug, but that you knew what you were doing.

"Wilfully" means done with design, purposely.

"Unlawfully" means doing something that was prohibited by law.

"Feloniously" means with a criminal intent, with an evil disposition, doing something consciously, knowing that it was wrong, with a guilty mind.

And this other word "corruptly" is a word that is used in this statute and used in this indictment and which is synonymous in point of law with the requirement of proof of criminal intent. And that is why I told you with respect to the statute that when the statute talked about whoever corruptly did thus and so that that in point of law meant whoever did thus and so which is the prohibited act with a criminal intent.

Now, maybe I have confused you more. I don't know. But let me turn to some of the words of the Supreme Court and [147] see if they have expressed in there any clear language. Well, they talk in the *Morisette* case a great deal about criminal intent, but in lawyer's language that perhaps if read out



of context might be more confusing to you than my explanation, but they do quote at page 247 of 342 U. S. from a case which says this and which is in keeping with that which I have told you.

“It is alike the general rule of law and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system (unless in exceptional cases), both must be found by the jury to justify a conviction for crime.”

That is end of the quotation. There must be, to add my own words again, although they are borrowed words, the combination of the doing of a prohibited act with a criminal intent, with a guilty knowledge, guilty mind, evil disposition. And to have done with that disposition which the law prohibited consciously and purposely.

Very well. I am hopeful that this explanation will enable you to go about your work with dispatch and in addition will be satisfying. And if you will step outside for a moment while I speak to the lawyers and see what they say of what I said to you, then I will call you back.

(Jury leaves court room at 5:35 p.m.)

The Court: Very well. The jury is now absent from the court room. To that which I have said to the jury [148] additionally in response to their questions are there any exceptions to be taken?

Mr. Richardson: Not from the government, sir.

Mr. Soares: The only thing I wish to comment on, if the Court please, is the protection of the posi-

tion that I have consistently taken, with particular reference to your Honor's opening remarks that certain words were misplaced in the indictment, and that the law inserts that it is charged—of course we adhere to the position that "corruptly" should have qualified "endeavor."

The Court: Oh, I agree with you. I agree with you. All I am saying to them is that by the concluding phrase, in violation of section 1503, the government has been saved against your objection by that, implying criminal intent. And it should be read just as if the word "corruptly" appeared after the word "did." Then you translate the word "criminally" into "criminal intent."

Mr. Soares: More than anything else I am here to protect the position because so often you call the Court's attention to it and you recede from the position and all that.

The Court: Yes. All right. Perhaps I might in conclusion tell them that again in just that simple language and put a period there, because that perhaps is even a better way of expressing it.

Mr. Soares: I think that our position is properly [149] taken care of. I would prefer to allow the jury to go out with what your Honor has said directly, which I think has been well said, than to have them distracted.

The Court. You don't want me to make it any clearer?

Mr. Soares: No, I won't mind how clear your Honor makes it. But to say that it was misplaced

or appeared there or another place is going to distract their attention.

The Court: Well, the fact is, as you know, that the government did misplace this emphasis in this indictment.

Mr. Soares: That is true enough. That is why we said that we should not go to trial on the indictment. But that is neither here nor there and it is taken care of. I agree that it should have taken out all references to corrupting and leave it as to influencing the administration of justice.

The Court: Well, in any event, my ruling is that the concluding phrase saved the day for them. And I have charged them that the prohibited act must have been done with a criminal intent. I think what is bothering them must be the repetition of that phrase with respect to the juror Peneku. And I think they can't quite figure out whether or not there is a charge here of doing an act, of doing acts or one act. In any event, I think that I have explained it to them adequately and as clearly as can be done. And if that doesn't clear it up, why, we will see what happens by way of additional questions that may be asked. [150]

(Jury returns to court room at 5:40 p.m.)

The Court: Note the presence of the jury and the defendant together with counsel. I have nothing further to add other than to ask if you feel that your questions have been answered and if you stand ready to go back to the jury room to deliberate further, or are there additional questions that you want to ask at this time?

Juror Soon: Can we ask you——

The Court: Just a minute until I get your name. Just ask a question.

Juror Soon: Well, there are two points there at the beginning where you stated on the verdict of guilty you must have two things. If one of them is lacking you have to go the other way. Would you mind going over that part again?

The Court. I would be very happy to. With respect to an alleged crime of the felony type—a felony is a kind of a crime for which the prescribed punishment is more than one year—for that kind of a crime, the proof must consist of proof beyond a reasonable doubt in order to have a conviction; that not only was the prohibited act done in fact but that in fact it was also done with a criminal intent. So that from the evidence you must determine as to whether or not if the act was done it was done with a criminal intent. Now, you have to break down criminal intent to find out what that looks like. And you find that it looks like, so to [151] speak, the doing of an act knowingly, wilfully, unlawfully and feloniously. Now, how do you do an act knowingly? You do it consciously as distinguished from accidentally. Wilfully, you do it purposely, designedly. Unlawfully, you know that you are doing something that the law prohibits. And a man is presumed to know the law. The only relevancy of ignorance of the law is with respect to criminal intent. If there was complete ignorance of the law and you are satisfied on that score, then there might be said to be no criminal intent, de-

pending on the evidence. And the next word is "feloniously," done with the mind and disposition of a felon, one who is bent on doing evil, with an evil mind or disposition. So that is what the old common law phrase means, the doing of a prohibited act with an evil hand combined with an evil mind. And it is the two things together that constitute the crime. If either one of them is lacking, if either criminal intent is lacking or proof beyond a reasonable doubt that the act was not done, there is a failure or proof in either of those two essentials, then your duty is to acquit.

On the other hand, if the proof satisfies you beyond a reasonable doubt that the prohibited act was done with a criminal intent, then your duty is to convict. Does that help you?

Juror Soon: Do you have to have knowledge of the law? [152]

The Court: No, you don't have to have knowledge of the law, because every man is presumed to know the law. You are charged with knowing the law. The only relevancy of ignorance of the law is with respect to whether or not if there is proof of ignorance of the law that can be said to negative criminal intent. Let me give you that instruction again. Now, certainly before I give it to you, what is meant by what I last said is this, that if you didn't know the law in fact prohibited a particular act then it might be said that lacking that actual knowledge you did not do an act with a criminal intent.

Let me read that instruction to you.

“It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law. Nor is ignorance of the law available as a defense to a person who has committed a crime. Everyone is presumed to have knowledge of what the law forbids and what the law commands. However, evidence, direct or circumstantial, that the accused acted or failed to act because of ignorance of the law is to be considered by you in determining whether or not the accused acted or failed to act with a criminal intent as charged.”

Now, you are to determine whether or not here there is any evidence of ignorance of the law. If there is, then you are to determine whether or not the accused acted with or without criminal intent charged. Does that help you? [153]

Juror Soon: Yes, sir.

The Court: Anything further? All right. You will return—oh, excuse me. Would you like them to go out again or would you like to step to the bench?

Mr. Soares: No.

The Court: All right. You will be taken to the jury room to deliberate further and the court will stand at recess to await your verdict.

(The jury retired again to the jury room at 5:48 p.m.)

(The jury returned to the court room at 9:24 p.m.)

The Court: Note the presence of the jury and of the defendant together with counsel. Mr. Chastain, I am advised by a note from you that the jury has arrived at a verdict. Is that correct?

The Foreman: That is right, your Honor.

The Court: Will you please hand the same to the Clerk.

(The foreman hands an envelope to the clerk.)

The Court: Very well. The defendant will rise. The Clerk will read the verdict.

The Clerk: Omitting the heading, title and cause—"Verdict."

"We, the jury, duly empaneled and sworn in the above-entitled cause, do hereby find the defendant, Stephen Kong, guilty as charged in the indictment herein. [154]

"Dated: Honolulu, T.H., this 17th day of August, 1953.

"Samuel L. Chastain, Foreman."

The Court: Such, Mr. Foreman, is the verdict of the jury?

The Foreman: Yes, your Honor.

The Court: So say you all, ladies and gentlemen of the jury?

(Affirmative response.)

The Court: Do you wish the jury polled?

Mr. Soares: No.

The Court: Very well. Thank you very much.

ladies and gentlemen. Your duty is performed, in accordance with the obligations as jurors. The verdict will be accepted and recorded on the basis of which—the verdict being one of guilty—thus the defendant is adjudged guilty, and the jury is excused until when? Is it Thursday?

The Clerk: Wednesday morning at 9 o'clock.

The Court: At 9 o'clock. Very well. The defendant will report tomorrow morning at 9:00 to the probation officer for pre-sentence investigation. The jury is excused. Thank you very much. The court will stand adjourned after the jury is excused.

(Jury leaves courtroom.)

The Court: How about bond, Mr. [155] Richardson?

Mr. Richardson: We don't insist on any increase. I think we can continue the same bond. I think it is a thousand dollars. I am not sure.

Mr. Soares: Are you thinking of increasing the bond?

Mr. Richardson: I just said I didn't ask for an increase. Whatever it is, if your Honor please, we would submit to the same figure, if it is all right with the Court.

The Court: The record will show in a moment what it is.

Mr. Soares: It could be endorsed on the face of the indictment, your Honor.

The Court: That may be where it is. Is it on the face of the indictment, Mr. Clerk?



The Clerk: No, your Honor. It was in a secret file, your Honor.

Mr. Richardson: If your Honor please, it is possible that no bond had been posted in this case.

The Clerk: I don't think he made bond.

Mr. Richardson: In that case, I think we should have some sort of a bond after conviction.

Mr. Soares: If there is no bond, I am going to ask none be required.

The Court: I would go along with that proposition, but I think, as you do, that there should be a——

Mr. Soares: I am not making a point, if there is no [156] bond, and you are justified in asking for one.

Mr. Richardson: Well, I suggest a thousand dollar bond.

The Court: Very well. If there is no bond, the subject has been overlooked through inadvertence and let the bond then be set. I repeat again, if there is no bond, that it set in the sum of one thousand dollars, and I will give the defendant until 4 o'clock tomorrow to post the same.

Mr. Soares: Thank you.

The Court: However, he will report tomorrow morning at 9 o'clock to the probation officer for presentence investigation.

Mr. Clerk: Here are the notes from the jury.

The Court: Very well. The Court will stand adjourned.

(The Court adjourned at 9:30 p.m.)

[Endorsed]: Filed October 8, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL

United States of America  
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from page 1 to page 234, consists of a statement of the names and addresses of the attorneys of record, and of the original pleadings and transcripts of proceedings as hereinbelow listed and indicated:

	Pages
Indictment .....	2 - 3
Transcript of Proceedings With Reference to Indictment .....	4
Plaintiff's Requested Instructions .....	10 - 12
Defendant's Requested Instructions .....	13 - 16
Judgment and Commitment .....	17
Notice of Appeal .....	18 - 19
Cost Bond .....	20 - 22
Designation of Record on Appeal .....	23 - 24
Counter-Designation of Record on Appeal	24a- 24b
Transcript of Proceedings July 15, 20, 1953 .....	25 - 73

Pages

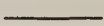
Transcript of Proceedings Aug. 14, 17,  
1953 ..... 74 -234

I further certify that included in said record on  
appeal is a copy of the Minutes of Court of Febru-  
ary 18; July 15, 20; August 14, and August 17,  
1953 ..... 5-9

In Witness Whereof, I have hereunto set my hand  
and affixed the seal of said District Court this 13th  
day of October, A. D., 1953.

[Seal]     /s/ WM. F. THOMPSON, JR.,

Clerk, United States District  
Court, District of Hawaii.



[Endorsed: No. 14086. United States Court of  
Appeals for the Ninth Circuit. Stephen Kong, Jr.,  
Appellant, vs. United States of America, Appellee.  
Transcript of Record. Appeal from the United  
States District Court for the District of Hawaii.

Filed October 20, 1953.

/s/ PAUL P. OBRIEN,

Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

Cr. No. 10,704

STEPHEN KONG, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS INTENDED TO BE  
RELIED UPON ON APPEAL

Comes now Stephen Kong, Jr., appellant, by O. P. Soares, his attorney, and hereby makes his statement of points intended to be relied upon on appeal, to-wit:

1. The Court should have granted appellant's motion to dismiss the indictment on each of the grounds thereof, namely:

(a) The defendant had been in jeopardy of conviction of the offense charged in said indictment;

(b) The defendant was deprived of his right to a speedy trial;

(c) The indictment does not state facts sufficient to constitute an offense against the United States.

2. That the Court erred in refusing to give defendant's requested Instructions Nos. 1, 2, 3 and 4.

3. The Court erred in instructing the jury that the indictment otherwise faulty was made good by reading into it at a designated point a word which was not there.

4. The Court erred in denying defendant's motion for judgment of acquittal as to each of the following grounds of said motion:

(a) That the indictment does not charge the defendant with corruptly endeavoring to influence the due administration of justice;

(b) That the indictment does not indicate the manner in which due administration of justice was attempted to be interfered with;

(c) That the charge against the appellant is not clearly stated;

(d) That the evidence failed to show an endeavor on the part of the defendant to act corruptly;

(e) That there was no evidence of motive.

5. That the indictment upon which the appellant was tried is so vague, ambiguous and uncertain as to deprive appellant of his Constitutional rights.

6. That the indictment upon which the appellant was tried fails to allege facts consisting an offense against the United States.

Dated: Honolulu, Hawaii, October 19, 1953.

**STEPHEN KONG, JR.,**

Appellant,

By /s/ **O. P. SOARES,**

His Attorney.

Service of copy acknowledged.

[Endorsed]: Filed October 20, 1953.

The first part of the book is devoted to a general history of the United States from its discovery to the present time. The author discusses the various stages of the nation's development, from the early colonial period to the American Revolution, the formation of the Constitution, and the subsequent expansion of the country. He also touches upon the social and economic changes that have shaped the nation over the centuries.

The second part of the book is a detailed account of the American Revolution, from the outbreak of hostilities in 1775 to the signing of the Treaty of Paris in 1783. The author provides a comprehensive overview of the military, political, and social aspects of the war, as well as the role of the various states and the Continental Congress.

The third part of the book is a history of the United States from 1783 to the present. The author discusses the early years of the Republic, the growth of the nation, and the various challenges it has faced, including the Civil War, the Reconstruction period, and the rise of the industrial revolution. He also touches upon the more recent history of the country, including the two world wars and the current political climate.

APPENDIX

This appendix contains a list of the various treaties and agreements that have been signed by the United States since its independence. It also includes a list of the various states and territories that have been admitted to the Union, as well as a list of the various presidents of the United States.